

84-685(1) .

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ALEXANDER L. STEVAS,  
CLERK

CASE NO.

in the  
**Supreme Court**  
of the  
**United States**

OCTOBER TERM 1984

DONALD NIXON RUSH, et al.  
*Petitioner.*

*vs.*

UNITED STATES OF AMERICA  
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT**

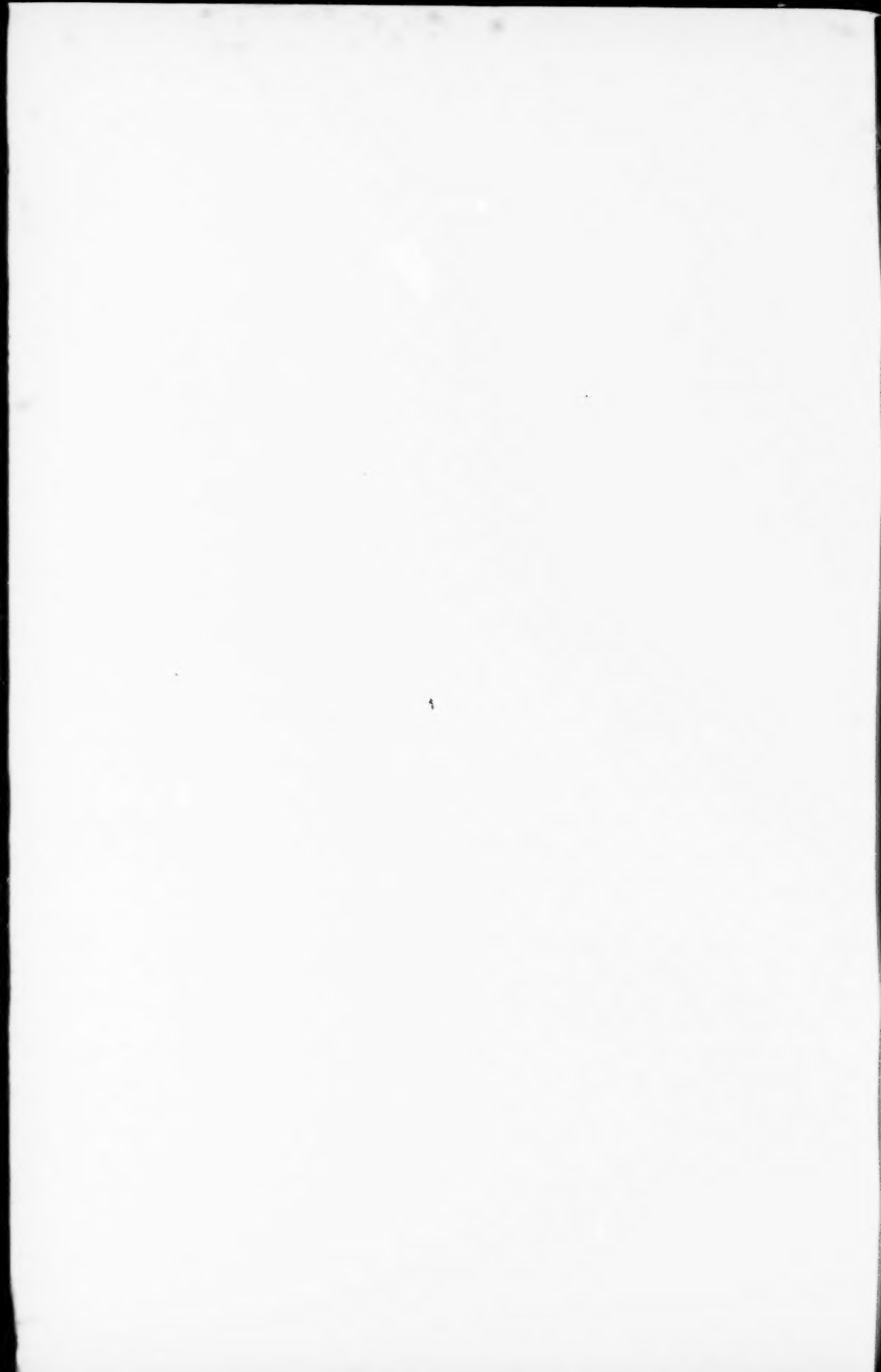
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## QUESTIONS PRESENTED

### I.

WHETHER THE DISTRICT COURT ERRED IN OVER-RULING DEFENDANT'S MOTION TO DISMISS FOR VIOLATION OF THE SPEEDY TRIAL ACT OF 1974, AS AMENDED, 81 U.S.C. §3616 ET SEQ.

### II.

WHETHER THE DISTRICT COURT VIOLATED THE PROVISIONS OF 18 U.S.C. §3161(c)(2), SPEEDY TRIAL ACT OF 1974, AS AMENDED, BY REQUIRING DEFENDANTS HARRY J. SHNURMAN AND JACOB SHNURMAN TO PROCEED TO TRIAL LESS THAN 30 DAYS AFTER THE APPEARANCE OF TRIAL COUNSEL.

### III.

WHETHER TRIAL COURT DENIED APPELLANTS' RIGHTS UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION BY RULING, AS A MATTER OF LAW, THAT THE DEFENDANTS COULD NOT EXERT A RELIGIOUS EXEMPTION DEFENSE TO THE CHARGES.

### IV.

WHETHER THE TRIAL COURT ERRED IN REFUSING TO SEVER TWO DISTINCT GROUPS OF CO-DEFENDANTS, ONE FROM THE OTHER, WHO OFFERED MUTUALLY EXCLUSIVE, CONFLICTING DEFENSES.

LIST OF PARTIES PETITIONER

First Circuit #83-1177

DONALD NIXON RUSH  
LARRY JOSEPH LANCELOTTI  
GREGORY LEE LANCELOTTI  
HARRY J. SHNURMAN  
ROBERT MICHAEL COHEN  
THOMAS G. CONVERSE  
DAVID EARL JOHNSON  
IRVING F. IMOBERSTAG  
CARL ERIC OLSEN  
JACOB SHNURMAN  
RANDALL COLLINS  
JEFFREY ALLEN BROWN  
DAVID NISSENBAUM

First Circuit #83-1391

MICHAEL LEE RISOLVATO

First Circuit #83-1463 .

CHARLES LEATON

EACH OF THE ABOVE APPEALS WAS CONSOLIDATED  
AND HEARD SIMULTANEOUSLY, BY ORDER OF THE  
FIRST CIRCUIT COURT OF APPEALS.

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### Appendix A:

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The Petitioners herein, DONALD NIXON RUSH, ET AL., pray that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals for the First Circuit, entered in the above case on June 27, 1984.

#### OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A hereto, infra, (App. 1 through 63) is reported at 738 F.2d 497 (1st Cir. 1984).

#### JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1984, Appendix B, infra, (App. 64). Petitions for rehearing were filed by various Defendants, and denied on July 26, 1984, Appendix B, infra, (App. 65 ). The jurisdiction of this Court is involved under 28 U.S.C. §1254(1), Appendix D, infra, (App. 85) and Rule 17, Rules of the United States Supreme Court.

## STATUTES INVOLVED

The Federal statutory provisions involved, 18 U.S.C. §3161, et seq. as amended; 21 U.S.C. §841(a)(1) and (b)(6); and 21 U.S.C. §846, are set forth in Appendix C, infra, (App. 70 ). The statutory authorization for appeals from final judgments of the Circuit Courts, 28 U.S.C. §1254(a), is set forth in Appendix D, infra, (App. 85)

## STATEMENT OF THE FACTS

On October 29, 1980, twenty-three defendants, including all petitioners herein except David Nissenbaum, were indicted in a three-count indictment charging offenses allegedly committed during the period March 19, 1980, up to and including October 20, 1980. Count I charged conspiracy with intent to distribute approximately 25 tons of marijuana in violation of 21 U.S.C. §841(b)(6) and 846; Count II charged

possession with intent to distribute approximately 25 tons of marijuana in violation of U.S.C. §841(a)(1) and (b)(6), and 18 U.S.C. §2; and four defendants were charged with violations of 18 U.S.C. §2274, which charges were later dismissed by the government.

A superceding indictment, which essentially only added petitioner, D. Nissenbaum, was drawn and all defendants were arraigned on the superseding indictment on December 6, 1982.

Some of the defendants notified the Court in a "Memoranda and Proffer" dated March 9, 1981, of their intent to assert a First Amendment Freedom of Religion factual and legal defense to the charges. By Order of the Court dated March 25, 1981, Trial Court approved the use of the First Amendment defense and ordered severance for trial of the First Amendment defendants from those not asserting such defense. On April 22, 1981, the First Amendment defendants filed a law memorandum in support of

their position. On June 2, 1981, the United States filed its Motion in Resistance to the defense.

On July 17, 1981, Trial Court issued an Order and Report of Pretrial Conference listing the petitioners by defense and noted that the two groups were to be severed over objection of the Government. The Trial Court noted the severance and separate trials in Order dated August 11, 1981, and September 21, 1982.

On June 6, 1981, Trial Court entered an Order continuing the trial because of a conflicting trial involving 10 of the co-defendants in Miami, Florida. The Order stayed the provisions of the Speedy Trial Act of 1974 by reason of Section 3161(h)(8)(A), the "ends of justice" exemption to 18 U.S.C. 3161. On July 19, 1981, ten defendants filed a Motion to Dismiss on the basis of double jeopardy. On August 11, 1981, Trial Court dismissed Count I

against Defendant Middleton, and on September 11, 1981, denied the Motion of the other nine co-defendants. On Sept. 11, 1981, the nine co-defendants filed an interlocutory appeal in the First Circuit on the double jeopardy issue. On Sept. 22, 1981, Trial Court required a limited waiver of Speedy Trial to be signed by each non-appealling defendant and filed with the Court.

On March 19, 1982, the First Circuit affirmed the Trial Court, in all ten appeals. See U.S. vs. Booth, 637 F.2d 27, (CA1 1982), and U.S. vs. Middleton, 637 F.2d 31, (CA1, 1982). The mandate for the nine defendants not dismissed from the case was issued by the First Circuit on April 9, 1982. The government filed an untimely request for rehearing on May 3, 1982, in Middleton. On August 10, 1982, the First Circuit denied rehearing, and on August 17, 1982, mandate issued from the First Circuit in Middleton.

During all of this time the Clerk of the First Circuit retained all files and papers of the nine co-defendants in his office.

On October 7, 1982, the Trial Court, on its own motion, invited the government to file a Motion in Limine with regard to the First Amendment defense. The government filed such motion on October 12, 1982, and on November 23, 1982, Trial Court entered an order refusing to allow the use of the 1st Amendment defense as a matter of law.

On November 2, 1982, defendants filed a Motion to Dismiss based upon violation of the Speedy Trial Act of 1974, as amended. On November 15, 1982, the government resisted such motion, and on November 23, 1982, Trial Court denied the Motion. On November 30, 1982, defendants sought permission for interlocutory appeal on the Speedy Trial issue which was denied on Dec. 29, 1982, for want of jurisdiction by the First Circuit.

On December 6, 1982, the defendants were reindicted on the superceding indictment. Trial was held December 7-17, 1982. On December 17, 1982, the jury found D. Rush, L. Lancelotti, Cohen, Collins and Brown guilty on both counts, acquitted Hanson on both counts, and convicted nine on the possession count only and Nissenbaum on conspiracy only (Count I).

Upon appeal to the First Circuit that Court upheld the Trial Court in all of its rulings and denied each, and all, of the defendants' contentions.

#### REASONS FOR GRANTING THE WRIT

1. On November 22, 1982, Trial Court denied defendants' motion to dismiss for violation of 18 U.S.C. §3161 et seq., as amended, the Speedy Trial Act of 1974. Defendants were arraigned in this case on October 30, 1980, and on November 2, 1982, the date of defendants' motion, a total of 734 days had elapsed from indict-

ment. Thus, a prima facie case for dismissal had been established by defendants (§3161 (c)(1) and 3162 (a)(1)) unless the government was able to exempt all but 70 unexcused days under the provisions of §3161(h)(1-7) or (8).

The First Circuit found that, at most, 47 days of non-excludable time elapsed during the 734 day delay. While Petitioners do not agree with all of the accounting done by the appellate court, there is really only one time period, consisting of 165 days between the date of issuance of the mandate (April 10, 1982) in the Booth, supra, interlocutory appeal and the waiver of further Speedy Trial time on September 21, 1982, which is of major concern.

Factually, nine defendants filed an interlocutory appeal on the denial of a motion to dismiss for double jeopardy. The government filed a companion appeal on the granting of a dismissal to one defendant,

Middleton. Various provisions of 3161(h)(1-7) act to exclude all time during the pendency of the interlocutory appeal, which exclusions applied to all defendants by operation of (h)(7), including all non-appealing defendants. After the Circuit Court affirmed the Trial Court in all 10 cases, mandate issued on April 10, 1982, to the District Court for the nine defendants remaining at jeopardy. The government filed an untimely Motion for rehearing in Middleton on May 3, 1982, which Motion was denied on August 10, 1982. No mandate issued in Middleton until August 17, 1982.

Petitioners argue that the period from the issuance of the mandate for those defendants who remained in jeopardy started the Speedy Trial clock on April 10, 1982. See U.S. vs. Mack, 669 F.2d 28 (CA1 1982); U.S. vs. Ross, 654 F.2d 612 (CA12, 1981); U.S. vs. Gillis, 645 F.2d 1269 (CA8, 1982); and U.S. vs. Cook, 592 F.2d 877, (CA5, 1979).

While these cases deal with the restart of the Clock following an interlocutory appeal by the government under 3161(h)(1)(E), petitioners urge that the reasoning applies in these cases also.

The First Circuit ruled that no time elapsed on the Speedy Trial clock until the mandate issued in Middleton, ruling that "Middleton did not cease to be a co-defendant as to whom the time for trial ha(d) not yet run and no motion for severance ha(d) been granted." (App. 31-38 ) This ruling is logically defective in holding that an individual against whom all charges have been dismissed, and the dismissal is also affirmed on appeal, is still a co-defendant for whom no severance had been granted. Logically, a dismissal is the mose extreme severance. Further, if an individual no longer is in jeopardy, he is no longer a co-defendant. The First Circuit cites as authority for its position

U.S. vs. Lyon, 588 F.2d 518 (CA8 1978).

Lyon is clearly distinguishable in that the defendant there sought Certiorari on one of two charges against him and requested the forwarding of materials on both cases, then, upon denial of Certiorari on the first charge, the defendant moved for dismissal of the second charge on Speedy Trial grounds. Here the nine co-defendants remaining at jeopardy made no request to have the Clerk retain the files and papers and the mandate issued as to them. As the First Circuit recognized, in its ruling on the motion for rehearing, the Trial Court could have proceeded to trial on all remaining defendants or could have exercised an (h)(8)(A) "ends of justice" exemption while waiting a decision on Middleton. A Petition for rehearing on a dismissed defendant cannot be said to "concern" the remaining co-defendants such as to justify the exclusion of 165 otherwise unexcused days of delay.

Further, in the petition for rehearing, defendants cited the First Circuit to U.S. vs. Black, 733 F.2d 349 (CA4, 1984), a case decided after submission of this case to the First Circuit. Black held that the Court of Appeals has only 30 days to decide a motion for rehearing under 3161(h)(1)(J) before the Speedy Trial clock starts, even if the Motion was not timely filed. In this case the First Circuit held the Motion filed by the government under advisement for 123 days. If only 30 are excludable 93 unexcused days must be added to the 47 found by the Circuit Court, which total would require dismissal. The First Circuit sought to distinguish Black as not being on point, but the decision in Black and Rush are clearly contradictory and opposite in their holding.

It appears then that the ruling in Rush herein is directly contradictory to the rulings in Mack, supra, (CA1); Ross, supra, (CA9); Gillis, supra, (CA8); Cook,

supra, (CA5); and Black, supra, (CA4).

2. On November 21, 1982, Trial Court reversed its decision concerning the use of a "religious" defense by some defendants, and a "conventional" defense by others. The Trial Court had recognized the "religious" defense since as early as March 17, 1981. During the period March 17, 1981, and prior, until November 21, 1982, the Trial Court was aware of, and allowed, one lawyer to represent two defendants, so long as the defendants were planning on using different defenses and waived any potential conflicts. Throughout this period James Cook represented Harry Shnurman, a "religious" and Charles Leaton, a "conventional" without any switching of the nature of the defense by either defendant. William Kutmus represented Jacob Shnurman, a "religious" and Michael Risolvato , a "conventional" in a like manner.

Following the Order of November 21, 1982, Jacob Shnurman sought court-appointed

counsel as an indigent. Harry Shnurman retained new counsel approximately 7 days prior to trial and within 10 days of the court's order.

On December 6, 1982, all defendants were arraigned on the superseding indictment prior to Trial on December 7, 1982. At that time Dennis Levendowski was appointed to represent Jacob Shnurman and met him for the first time. It was to be Mr. Levendowski's first federal trial and his first criminal trial, ever.

On December 6, 1982, both Harry Shnurman and Jacob Shnurman sought a 30-day continuance of trial from the date trial counsel first appeared citing 18 U.S.C. §3161(c)(2), cited in Appendix C., infra, and U.S. vs. Arkus, 675 F.2d 245 (CA9, 1982) and U.S. vs. Campbell, 706 F.2d 1138 (CA11, 1982). Trial Court countered the 30-day request with an offer of 7 days to prepare which was denied as

not complying with the law and not within the discretion of the Trial Court to alter the Congressionally mandated 30-day minimum period.

The First Circuit ruled that the provisions of 3161(c)(2) began at the time of original indictment even in the event of reindictment. Petitioners concede this reasoning but urge that the First Circuit ignores the further language of the statute, and the reasoning of the 9th and 11th Circuits, that the 30 days minimum also applies from the first date of appearance of trial counsel. In U.S. vs. Harris, 724 F.2d 1452 (CA9, 1984) the Ninth Circuit reversed convictions because trial was held within 30 days of the initial appearance of trial counsel even though the defendants had appeared at arraignment with counsel, although not trial counsel, more than 30 days before trial. The Harris court held that less than 30 days preparation time for Trial counsel was inadequate "per se"

and in clear violation of a Congressional mandate. See also U.S. vs. Daly, 716 F.2d 1499, (CA9, 1983). Thus the First Circuit ruling in Shnurman's cases is directly contradictory to the language of the statute and the opinions of the 9th and 11th Circuit Court of Appeals.

3. On November 21, 1982, Trial Court ruled that:

(1) That as a matter of law the First Amendment does not protect the importation of marijuana and its possession with the intent to distribute by the defendants;

(2) That defendants are precluded from introducing at trial evidence concerning the Ethiopian Zion Coptic Church and the use of marijuana by its members insofar as such evidence relates to their First Amendment defense. Dated this 23rd day of November, 1982.

Trial Court relied on U.S. vs. Kuch, 288 F.Supp. 439, (D.C.C. 1968), and Leary vs. U.S., 383 F.2d 851, (CA5, 1967) as establishing the precedent that religious use of marijuana is not a defense to criminal charges. Both Leary and Kuch are

clearly distinguishable in that the defendant in both cases failed to establish that he was a member of a bona fide religion and that the use of the marijuana was an integral part of their religious beliefs, which is the first part of the test set forth in Wisconsin vs. Yoder, 406 U.S. 205, (1972). In this case the government conceded that the Ethiopian Zion Coptic Church, of which all defendants were identified as members, was a bona fide religion and that the use of marijuana was an essential element of their religious beliefs and practices.

Petitioners offered, through the Law Memorandum and Proffer of March 9, 1981 and the Law Memorandum of April 22, 1981, to show the Trial Court how the marijuana would be used for exclusively religious purposes solely by members of the Coptic Church, without any intent to distribute as alleged in the charges. The Trial Court recognized the validity of this de-

fense, and planned for trial on this basis as early as March 17, 1981. See also Trial Court's orders of July 17, 1981, August 11, 1981, and September 21, 1982, calling for separate trials of the "religious" and "conventional" defenses over the objection of the government. Thus, for over a year the Trial Court recognized the defense, scheduled trial to include such a defense on at least 4 occasions, and had the proposed defense thoroughly briefed and argued on a number of occasions.

Defendants urged the Trial Court that the religious defense was a two-pronged attack. First that as a matter of law their use of marijuana was exempted from criminal prosecution by operation of the First and Fourteenth Amendments to the U.S. Constitution. Defendants urged the Trial Court that Yoder placed the burden on them to establish the validity of their religion and their essential use of marijuana within the religion. If the defendants

accomplished this task then the burden shifts to the government to prove a "compelling state interest" sufficient to override the religious guarantee. Defendants also urged that equal protection of law compelled the Court to allow them this opportunity and that this was not a matter so clear as to be decided as a matter of law without presentation of evidence to a jury.

Defendants also offered to prove how all of the marijuana could be used solely by members of the Ethiopian Zion Coptic Church within their religious beliefs and practices without distribution of the marijuana to non-religious users. Defendants made an offer of proof including the use of a number of experts concerning their uses of marijuana.

Trial Court refused to allow defendants the opportunity to present these defenses and the First Circuit affirmed that ruling,

citing U.S. vs. Lee, 455 U.S. 252 (1982) for the standard of law. While recognizing that the first Lee standard is clearly met here, and that there is considerable social, scientific and political controversy concerning the uses and effects of marijuana, the First Circuit nonetheless ruled the defendants had no right to even present evidence in support of their position. The First Circuit also rejected equal protection claims without allowing evidence as to the similarity between the Ethiopian Zion Coptic Church and the Native American Church and its use of peyote.

4. At trial the defendants aligned themselves into two camps, the "conventionals" who offered no proof but rather put the government to its burden, and the "Swiderski" defendants who contended and attempted to prove that they possessed the marijuana as joint possessors without the intent to distribute. Numerous requests for severance,

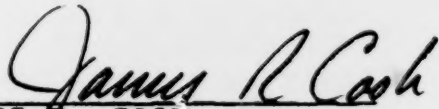
under Federal Rule of Criminal Procedure 14, were filed by both groups alleging irreconcilable and antagonistic defenses would, in effect, convict each other. The Trial Court for a period of almost two years (March, 1981 to November, 1982) agreed and ruled in favor of a severance. Then, on November 21, 1982, when the Trial Court ruled against the "religious" defense, it consolidated all defendants into a single group for trial. The Trial Court ruled that the defenses were not so irreconcilable or so antagonistic as to require a severance citing U.S. vs. Talavera, 668 F.2d 625 (CA1, 1982) as controlling. The First Circuit upheld the ruling citing also U.S. vs. Arruda, 715 F.2d 671, (CA1, 1982). These Courts erred in their ruling because of the highly prejudicial effect of having witnesses identify all defendants as members of a common group, but having only a portion of them claiming the vast quantities of marijuana involved and others, in effect, denying

their involvement. The "Swiderski" defendants painted all the "conventional" defendants with their religious brush to the detriment of the "conventionals." Likewise, the failure of all of the named defendants to admit to their possession undermined the credibility of the "Swiderskis." In effect the Trial Court allowed and encouraged each defense group to undermine the credibility of the other and to allow the defense of each group to assist in the conviction of the other.

CONCLUSION

For each and all of the foregoing reasons it is respectfully submitted that this Court accept jurisdiction of this appeal and grant the foregoing Petition for Writ of Certiorari.

Respectfully submitted,



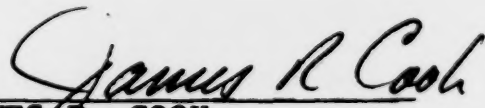
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COUNSEL FOR PETITIONERS,  
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SUPREME COURT OF THE  
UNITED STATES

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Petition for Writ of Certiorari was mailed on the \_\_\_\_\_ day of October, 1984, to:

The Solicitor General of  
the United States  
Department of Justice Bldg.  
Washington, D.C. 20530



JAMES R. COOK  
Attorney for Petitioners

# Appendix

APPENDIX A

No. 83-1177

UNITED STATES OF AMERICA,  
Plaintiff/Appellee,

vs.

DONALD NIXON RUSH, LARRY JOSEPH  
LANCELOTTI, GREGORY LEE LANCELOTTI,  
HARRY J. SHNRUMAN, ROBERT MICHAEL  
COHEN, THOMAS G. CONVERSE, DAVID  
EARL JOHNSON, IRVING F. IMOBERSTAG,  
CARL ERIC OLSEN, JACOB SHNURMAN,  
RANDALL COLLINS, JEFFREY ALLEN BROWN,  
and DAVID NISSENBAUM,  
Defendants/Appellants.

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No. 83-1391

UNITED STATES OF AMERICA,  
Plaintiff/Appellee,

vs.

MICHAEL LEE RISOLVATO,  
Defendant/Appellant.

---

No. 83-1463

UNITED STATES OF AMERICA,  
Plaintiff/Appellee,

vs.

CHARLES LEATON,  
Defendant/Appellant.

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United States Court of Appeals, First Circuit

APPEALS FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE

(Hon. Edward T. Gignoux, Senior U.S. District  
Judge)

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Before Coffin and Bownes, Circuit Judges,  
and Pettine, \* Senior District Judge.

---

James R. Cook, with whom Cook & Waters  
Law Firm, and William Kutmus were on brief,  
for Appellants.

James L. Sultan, by appointment of the  
Court, for Jacob Shnurman.

James D. Poliquin, by appointment of  
the Court, and Norman & Hanson on brief for  
Thomas G. Converse.

Irving F. Imoberstag on brief, pro se.

Carl Eric Olsen on brief, pro se.

Jeffrey Allen Brown on brief, pro se.

Margaret D. McGaughey, Assistant U.S.  
Attorney, with whom Richard S. Cohen, U.S.  
Attorney, and Jay P. McCloskey, Assistant  
U.S. Attorney, were on brief, for appellee.

June 27, 1984

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\* Of the District of Rhode Island, sitting  
by designation.

BOWNES, Circuit Judge. These appeals are taken by fifteen men convicted after a jury trial of one or both counts under a two-count indictment charging them with (a) conspiracy to possess marijuana with intent to distribute, 21 U.S.C. §§846 and 841(b)(6), and (b) possession of marijuana with intent to distribute, 21 U.S.C. §§841(a)(1) and 841(b)(6). Appellants' principal claims are that their speedy trial rights were violated, that some of them were denied the opportunity to raise the free exercise clause of the First Amendment as a legally sufficient defense, and that motions for severance were improperly denied. We affirm the convictions.

#### I. BACKGROUND

The evidence may be summarized as follows. On May 20, 1980, an isolated piece of property in Stockton Springs, Maine, was purchased by Appellant D. Nissenbaum under the alias Arkin. The so-called Arkin property included several buildings and storage

facilities. Five days later, an isolated shorfront property on Deere Isle, Maine, equipped with a deepwater dock and for buildings, was purchased with a \$100,000 downpayment in the name of Paula Leurs. Suspecting that the two properties might be used for illegal drug trafficking, law enforcement agents established surveillance of both properties in August, 1980.

On the evening of October 19, 1980, a pickup truck was observed leaving the Arkin property loaded with materials; it arrived at the Leurs property around 9:30 p.m. Shortly after 9:00 a.m., a dozen people were observed on the Leurs property carrying large objects, later identified as Zodiac rubber boats, down to the dock. Just after midnight, the JUBILEE, a large, ocean-going vessel, was observed approaching from the open sea. It followed the shoreline towards the Leurs property without navigational lights, dropped and cut its engines approxi-

mately one-tenth of a mile from the Leurs dock. Over a three-hour period, three rubber boats holding two people each made numerous trips between the dock area and the JUBILEE, transporting bales of what was later identified as marijuana from the JUBILEE to shore. The bales, after having been brought ashore, were loaded into pickup trucks and transported further inland.

The unloading of the marijuana bales continued for roughly three hours. At 3:05 a.m. on the morning of October 20, federal and state law enforcement officers entered the Leurs property in police cars with blue lights flashing. As the officers emerged from the cars and approached the dock area on foot, the people gathered there began to run away into the woods. The officers fanned out in pursuit. Tne of the appellants were apprehended at the time of the raid in the shore area and in the woods nearby,<sup>1</sup> and

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1. D. Rush, L. Lancelotti, G. Lancelotti, Leaton, H. Shnurman, Risolvato, Cohen, Converse, Johnson, and J. Shnurman.

two more were later found crouched in a hollow a short distance from the dock.<sup>2</sup> Approximately twenty tons of marijuana was seized.

When the raid began, the JUBILEE cut anchor and proceeded out to sea, pursued by a police patrol boat, a coast guard search-and-rescue boat, and then a coast guard cutter. The JUBILEE was finally intercepted and boarded after a protracted chase by the cutter and the four-man crew, including two of the present appellants,<sup>3</sup> was arrested.

Twenty-three people were arrested in connection with the October 20 raid and named in the original indictment returned on October 29, 1980.<sup>4</sup> A twenty-fourth defendant, D. Nissenbaum, was added in a

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2. Imoberstag and Olsen.

3. Collins and Brown.

4. Middleton, D. Rush, L. Lancelotti, Leaton, H. Shnurman, Risolvato, Cohen, Converse, Johnson, Booth, Hanson, Imoberstag, Olsen, J. Shnurman, J. Tranmer, C. Nissenbaum, D. Woodward, B. Rush, O'Hara, Collins, Brown and Lawler.

superseding indictment. By the time trial commenced in December, 1982, however, two defendants had become fugitives, another two had pleaded nolo contendere, and charges have been dismissed as to four others, leaving a total of sixteen defendants facing trial on the conspiracy and possession with intent charges.<sup>5</sup> Of these, five were convicted on both counts,<sup>6</sup> one on the first count only,<sup>7</sup> nine on the second county only,<sup>8</sup> and one was acquitted on both counts.<sup>9</sup>

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5. D. Rush, L. Lancelotti, G. Lancelotti, Leaton, H. Shnurman, Risolvato, Cohen, Converse, Johnson, Hanson, Imoberstag, Olsen, J. Shnurman, Collins, Borwn and D. Nissenbaum.

6. D. Rush, L. Lancelotti, Cohen, Collins and Brown.

7. D. Nissenbaum's motion for a judgment of acquittal at the conclusion of the evidence was granted with respect to the second count, his case went to the jury only on the conspiracy count.

8. G. Lancelotti, Leaton, H. Shnurman, Risolvato, Converse, Johnson, Imoberstag, Olsen and J. Shnurman.

9. Hanson.

## II. SPEEDY TRIAL ACT

The Speedy Trial Act of 1974, as amended, 18 U.S.C. §§3161 et seq., requires that trial commence within a specified time limit:

In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before judicial officer of the Court in which such charge is pending, whichever date last occurs.

18 U.S.C. §3616(c)(1). The same section, however, also provides that certain "periods of delay shall be excluded . . . in computing the time within which the trial . . . must commence." Id. §3161(h). In the absence of excludable delay under (h), the starting point for computing the seventy-day limit under (c) in this case would be October 30, 1980, the day after the original October 29 indictment.<sup>10</sup>

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10. All of the 24 defendants except for D. Nissenbaum were named in the Original Oct. 29 indictment.

See Fed. R. Crim. P. 45(a); Committee on the Administration of the Criminal Law, Judicial Conference of the United States, Guidelines to the Administration of the Speedy Trial Act of 1974, as amended, (hereinafter Guidelines) at 22-23; United States vs. Mers, 701 F.2d 1321, 1332 n.6 (11th Cir.), cert. denied, 52 U.S.L.W. 3422 (U.S. Nov. 28, 1983).

Among the time exclusions for "other proceedings concerning the defendant" are periods of "delay resulting from any pre-trial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of such motion." 18 U.S.C. §3161(h)(1)(F). The exclusion for pretrial is automatic; a showing of actual delay is not required. United States vs. Novak, 715 F.2d 810, 813 (3rd Cir.), cert. denied. sub nom. Ware vs. United States, 52 U.S.L.W. 3611 (U.S. Feb. 21, 1984); United States vs. Brim, 630 F.2d 1307 (8th Cir. 1980), cert.

denied, 542 U.S. 966 (1981). The length of time excludable under (h)(1)(F) is limited to "such delay as is reasonably necessary from the time of filing a pretrial motion to the time of conducting a hearing on it or completing submission of the matter to the Court for decision." United States vs. Mitchell, 723 F.2d 1040, 1047 (1st Cir. 1983).

The Defendants' first pretrial motion was a motion to preserve evidence filed on March 7, 1980, by Booth and joined by other defendants. A hearing on that motion was held on November 25, 1980, and it was agreed at that time that no court action was required. The time from November 7 through November 25 was clearly excludable under (h)(1)(F), and the district court so found. The govnmnet, however, points out that a government pretrial motion for an "order permitting destruction of seized marijuana" had been filed on October 24, 1980, before the speedy trial clock was

even set. A hearing on this motion was held on November 25, and it was granted in an order dated December 18. The government's motion thus overlapped the defendants', and we find that the time from October 30 until the filing of the Defendants' motion on November 7 was excludable.<sup>11</sup>

While the government's and the defendants' motions were still pending, defendants Booth and Middleton filed numerous additional pretrial motions in which other defendants joined, which independently gave rise to (h)(1)(F) exclusions. For purposes of speedy trial computations, the relevant motions are two suppression motions, both filed on November 21, 1980. The government filed an opposition on February 24, 1981, an evidentiary hearing was held on February 23-26, and

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11. The (h)(1)(F) exclusion applies whether the pretrial motion is filed before or after indictment. See S. Rep. No. 93-1021, 93d Cong., 2d Sess. 32-33 (1974), reprinted in A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 94 (Fed. Judicial Center 1980).

oral argument took place on March 17, 1981. The record before us leaves no doubt that the time from November 21, 1980, through March 17, 1981, was "reasonably necessary" under the standard adopted in Mitchell, 723 F.2d at 1047. On the facts in this case, we must reject the argument to the contrary. See United States vs. Gonsalves, No. 83-1562, slip op. at 6 (1st Cir. June 7, 1984); United States vs. Regilio, 669 F.2d 1169, 1172 (7th Cir. 1981), cert. denied, 457 U.S. 1133 (1982). We agree with the District Court that this entire period was excludable under (h)(1)(F).

The (h)(1)(F) exclusion applies not only to the particular defendants who file or jiong in pretrial motions, but also to co-defendants whose trial have not been severed and whose speedy trial time has not otherwise run out. Section (h)(7) provides an exclusion for "(a) reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the

time for trial has not run and no motion for severance has been granted." Every circuit court that has considered this provision has held in essence that "an exclusion applicable to one defendant applies to all codefendants." United States vs. Edwards, 627 F.2d 460, 461 (D.C. Cir.) cert., denied, 449 U.S. 872 (1980); see United States vs. Tedesco, 726 F.2d 1216, 1219 (7th Cir. 1984); United States vs. Campbell, 706 F.2d 1138, 1141 (11th Cir. 1983); United States vs. Fogarty, 692 F.2d 542, 546 (8th Cir. 1982), cert. denied, 51 U.S.L.W. 3685 (U.S. march 21, 1983); United States vs. McGrath, 613 F.2d 361, 366 (2d Cir. 1979), cert. denied sub nom. Buckle vs. United States, 446 U.S. 967 (1980); see also Novak, 715 F.2d at 814 (qualified by "reasonableness limitation").

We note that the Guidelines adopt a different interpretation of (h)(7). Under the Guidelines approach, an (h)(7) exclusion would be available only when a particular

defendant's seventy days had already run and additional time was necessary to permit a joint trial with an unsevered codefendant as to whom the seventy days had not yet run. See Guidelines at 52-53. The Guidelines approach represents a plausible application of the statutory text. It accurately allocates exclusions to defendants on an individual basis, thus minimizing the burden on individual defendants resulting from joint trials and affording each defendant the fullest possible benefit of the Speedy Trial Act. At the same time, however, the Guidelines approach considerably reduces the amount of excludable time in joint trials and puts pressure on trial courts to sever defendants or grant "ends of justice" continuances routinely as soon as a single defendant's seventy days expire, in order to avoid having even a single non-excludable day elapse thereafter. Moreover, the Guidelines approach calls for individual speedy trial computa-

tions which could easily become unmanageable in a multi-defendant case such as the present one. We cannot square such an interpretation with the congressional intent of avoiding waste of resources on unnecessary severances and separate trials. See Novak, 715 F.2d at 814-15; S. Rep. No. 93-1021, 93rd Cong. 1st Sess. 38 (1974) and S. Rep. No. 96-212, 96th Congress., 1st Sess. 24-25, reprinted in A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 135-36, (Fed. Judicial Center 1980). The Guidelines, of course, are not binding, and we find the reasons advanced by the Eleventh Circuit in Campbell compelling on this point. See 706 F.2d at 1141-43. Therefore, although we have not previously been directly confronted by the issue, see United States vs. Brown, No. 83-1876, slip op. at 5 (1st Cir. June 7, 1984), we now join the Second, Third, Seventh, Eighth, Eleventh and District of Columbia Circuits and hold that (h)(7) "stops the (speedy

trial) clock for one defendant in the same manner and for the same amount of time as for all co-defendants." Campbell, 706 F.2d at 1141.

Because of the (h)(7) exclusion, the (h)(1)(F) exclusions for the overlapping pretrial motions applied to all twenty-four defendants.<sup>12</sup> Up to March 17, 1981, therefore, none of the seventy days had run on the speedy trial clock. On March 17, the same day on which the suppression motions were argued, the district court issued an order scheduling trial for May 18, 1981. At the same time, the court granted motions to sever the trials of the three female defendants (J. Tranmer, C. Nissenbaum, and

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12. This and subsequent exclusions apply to D. Nissenbaum on the same basis as to the other defendants. Although D. Nissenbaum was first named in the superseding indictment returned on February 4, 1981, the speedy trial computations with respect to him under the seventy-day time limit are the same as for the defendants named in the original indictment because no nonexcludable time had yet run as to the others before February 4. The superseding indictment, of course, made no difference in the speedy trial computations for the defendants named in the original indictment. See Mitchell, 723 F.2d at 1045; Novak, 715 F.2d at 817-18.

D. Woodward) and denied the severance motions of the remaining defendants "except as follows:

- (a) The trial of those defendants who will assert a "First Amendment" defense shall be severed from the trial of those defendants who will not be asserting a "First Amendment" defense;
- (b) Each defendant shall advise the Court and the United States Attorney by Wednesday, April 15, 1981, as to whether or not he will be asserting a "First Amendment" defense;
- (c) Counsel for those defendants who will be asserting a "First Amendment" defense shall file with the Court and serve upon the United States Attorney by Wednesday, April 15, a joint memorandum of law in support of said defense; the Government shall similarly file with the Court and serve upon defendants' counsel by Monday, May 4, its responsive memorandum;
- (d) The trial of those defendants who will not be asserting "First Amendment" defense shall commence on Monday, May 18, at 10:00 a.m. (estimated one to two weeks trial time);
- . . . .  
(e) If upon the basis of counsel's written memoranda and any oral argument, the Court determines that the "First Amendment" defense is not viable, all defendants shall be prepared to proceed to trial on Monday, May 18 . . . .

(Emphasis in original.) Because (h) (8) carries exclusions applicable to one defendant over only two codefendants "as to whom . . . no motion for severance has been granted, " our computation of speedy trial time for the period after March 17, 1981, depends on a correct determination of the effect of the March 17 Order. The three female defendants whose trials were unconditionally severed are eliminated from our calculations at this point, for the charges against them were subsequently dropped and they are not involved in this appeal. As for the two groups of defendants--those "who will assert a 'First Amendment' defense," whome we shall call the "first amendment" defendants, and those "who will not be asserting a 'First Amendment' defense," or the "conventional" defendants--the severance was only conditional. The court expressly stated that all defendants would be tried together if the court ruled that the first amendment defense was not viable. As it

happened, the court did eventually make just that ruling, on November 23, 1982, and ordered all of the remaining defendants tried jointly. Thus, although it was contemplated for a protracted period that the trial of the first amendment defendants would take place after that of the conventional defendants in the event the first amendment defense were found valid, the precondition for the severance never came about, nor did the severance contemplated in the March 17 Order ever become effective.<sup>13</sup>

We do not think that the order can be viewed as providing some sort of temporarily operative severance for speedy trial purposes, because it is virtually impossible to ascertain the composition of the two groups referred to in the order. The record

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13. The question whether the denial of severance was an abuse of discretion under Federal Rule of Criminal Procedure 14 is analytically distinct; it is discussed in Part IV.

shows that as of July 17, 1981, twelve of the twenty-one defendants remaining at that time had advised the court that they would rely on a first amendment defense,<sup>14</sup> eight had advised that they would not,<sup>15</sup> and one remained undecided.<sup>16</sup> By August 11, 1981, three defendants had switched to the first amendment group.<sup>17</sup> By September 21, 1981, three more conventional defendants had switched to the first amendment group,<sup>18</sup> and one had abandoned that group to become undecided.<sup>19</sup> On October 7, 1982, only one or two remained in the conventional group, and only one remained on October 25.<sup>20</sup> To compute individual speedy trial time exclusions under (h)(7) in these circumstances

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14. D. Rush, H. Shnurman, Cohen, Johnson, Hanson, Imoberstag, J. Shnurman, Collins, Brown, Lawler, B. Rush and O'Hara.

15. Middleton, L. Lancelotti, G. Lancelotti, Leaton, Risolvato, Converse, D. Nissenbaum and Booth.

16. Olsen.

17. L. Lancelotti, Converse and Olsen.

18. Middleton, Risolvato and Booth.

19. Imoberstag.

20. Leaton.

would give gamesmanship priority over the practicalities of trial management. We do not construe the Speedy Trial Act to require anything of the sort. We hold that the March 17 order did not effectively sever the trials of the first amendment and conventional groups, and compute speedy trial time exclusions under (h)(7) with respect to proceedings after March 17, 1981, as if the severance motion had been denied at the outset.

Between March 17, 1981, when the district court took the suppression motions under advisement, and June 24, 1981, when it issued a detailed memorandum and order denying the motions, well over thirty days elapsed. An automatic exclusion is provided in (h)(1)(J) for "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court." Unlike the pre-

trial motion exclusion in (h)(1)(F), the advisement exclusion in (h)(1)(J) is expressly limited to thirty days, and cannot be extended without resort to another source of excludable time such as an "ends of justice" continuance under (h)(8).

United States vs. Cobb, 697 F.2d 38, 43 (2d Cir. 1982); see also Mitchell, 723 F.2d at 1047 N.6; United States vs. Janik, 723 F.2d 537, 544 (7th Cir. 1983). Of the ninety-eight days that elapsed between the oral argument and ruling on the suppression motions, therefore, only thirty are excludable under (h)(1)(J), namely the period from March 18 through April 16, 1981.

The government argues that an independent, overlapping exclusion arose under (h)(1)(F) on March 9, 1981, when H. Shnurman filed a memorandum and proffer with respect to the first amendment defense. We reject this argument because, in our view, an offer of proof is not a pretrial motion within the meaning of (h)(1)(F). Instead, it is

a submission of evidence which need not be admitted or excluded until trial; indeed, it is commonly carried over until trial. If such submissions were held to be pre-trial motions or "other proceedings concerning the defendant" triggering automatic exclusions under (h)(1), the Speedy Trial Act could easily be circumvented by filing offers of proof at an early stage and then failing to press for prompt disposition. This was not the intent of Congress under (h)(1)(F), see Brown, slip op. at 6; Mitchell, 723 F.2d at 1046, or (h)(1) generally. The district court did not exclude the proffered evidence until October 25, 1982, more than two and one-half years after the proffer was filed, and did so then only indirectly, in ruling on a government motion to limit the defense evidence. The district court did not treat the proffer as a pretrial motion for purposes of (h)(1)(F), and we see no reason to do so.

When the thirty-day exclusion under (h) (1) (J) expired on April 16, 1981, the speedy trial clock finally began to run. After eleven nonexcludable days, it stopped once more because ten of the Defendants<sup>21</sup> were being tried on similar charges in the United States District Court for the Southern District of Florida. Under (h) (1) (D), "delay resulting from trial with respect to other charges against the defendant" is automatically excludable. Appellants concede that the time from the commencement of the Florida trial on April 28, through its conclusion on June 19, 1981, was excludable.

The Florida trial disrupted the trial scheduled in the present case, which had initially been set for May 18, 1981. The fallback date of June 1, 1981, was likewise precluded by the Florida trial. On

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21. Middleton, L. Lancelotti, G. Lancelotti, Booth, Imberstag, J. Shnurman, B. Rush, Collins, Brown and Lawler.

June 4, 1981, stating that it has "been advised that the Florida trial has not concluded and that counsel would need additional time to prepare for trial" beyond the second fallback date of July 6, 1981, the district Court entered the following order:

IT IS ORDERED that, pursuant to Title 18 U.S.C., §3161(h)(8), the ends of justice served by the further continuance of the trial would serve the ends of justice and outweigh the best interest of the public in the speedy trial. Accordingly, the trial in this action stands continued until further order of the Court and that the time from May 18, 1981 until the time of the commencement of this trial be excluded from computation under the Speedy Trial Act.

Under (h)(8), delay resulting from a continuance is excludable if the trial judge grants the continuance on the basis of findings set out in the record that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial.<sup>22</sup> Appellants challenge the validity of the June 4 Order

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<sup>22</sup>  
ee. Section (h)(8) provides an exclusion for:

on three grounds: that retroactive continuances are not permissible; that the findings were inadequate; and that the speedy trial exclusion was improperly open-ended.

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22. (continued)

(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial

Other Courts have held that (h)(8) continuances may not be given retroactive effect-- that the order granting a continuance must be made at the outset of the excludable period. Janik, 723 F.2d at 545; United States vs. Brooks, 697 F.2d 517, 522 (3rd Cir. 1982), cert. denied sub nom. Reed vs. United States, 51 U.S.L.W. 3720 (U.S. April 4, 1983); but see United States vs. Cameron, 510 F.Supp 645,

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(cont)

itself within the time limits established by this section.

. . . .  
(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

649-50 (D.Md. 1981). This court has not addressed the question, United States vs. Jodoin, 672 F.2d 232, 237 (1st Cir. 1982), and need not do so now. Appellants concede that the entire period from May 18 to June 4 is excludable under (h)(1)(D) without regard to (h)(8).

As to the adequacy of the district court's findings, we note that, although the reasons for an (h)(8) continuance must be "reasonably explicit," United States vs. Perez-Reveles, 715 F.2d 1348, 1352 (9th Cir. 1983) (conclusory statements insufficient), they need not be given at the time the continuance is granted. United States vs. Bryant, 726 F.2d 510, 511 (9th Cir. 1984); Janik, 723 F.2d at 544-45; Brooks, 697 F.2d at 522; United States vs. Clifford, 664 F.2d 1090, 1095 (8th Cir. 1981); Edwards, 627 F.2d at 461, cited in Mitchell, 723 F.2d at 1043-44. The purpose of the requirement that reasons be stated is to insure careful consideration of the relevant factors by the

trial court and to provide a reviewable record on appeal. Both purposes are served if the text of the order, taken together with more detailed subsequent statements, adequately explains the factual basis for the continuance under the relevant criteria. Brooks, 697 F.2d at 520-22. Indeed, although the trial court may not merely incorporate reasons by reference, Janik, 723 F.2d at 545, it is not necessary for the court to articulate the basic facts where they are obvious and set forth in a motion for a continuance. Mitchell, 723 F.2d at 1044 (motion and court ruling read as complementary documents). In the present case, the court mentioned Florida trial and counsel's expressed need for additional preparation time as reasons for granting an "ends of justice" continuance; these in themselves are sufficient grounds under (h)(8)(B)(i) and(iv). Moreover, reviewing the protracted history of the case during the November 23, 1982 hearing on defendants' speedy trial

motion to dismiss, the Court elaborated on the basis of its June 4, 1981 order.

That order was entered, as the record will reflect, by agreement, indeed at the request of defense counsel, because of the Florida trial and other complications, and no defense counsel has even remotely suggested that they wished a Court order setting a trial date.

The Court also attributed any unnecessary delay to the defendants:

Whatever delays have resulted in this case have been entirely . . . the result of dilatory tactics and various appeals and motions, and so forth, filed by the defendants, and indeed counsel have on numerous occasions when the Court has raised the problem of speedy trial time running, counsel . . . have expressly consented, agreed, and requested continuances.

The district court's findings leave us with no doubt that the June 4 continuance was properly grounded in relevant criteria under (h)(8)(B). The trial could not have gone forward without the continuance, and the delay was requested by defense counsel to enable them to prepare following the Florida trial. Moreover, we think that on its face the record shows that this case was

sufficiently complex to justify a continuance under (h)(8)(B)(ii) because of the number of defendants, the plethora of motions, the potentially intricate questions raised by the first amendment defense, and the procedural tangle resulting from various defendants' changed in position. Cf. United States vs. Guerrero, 667 F.2d 862, 866 (10th Cir.), cert. denied, 456 U.S. (1982) (court need not articulate self-evident facts supporting (h)(8)(A) continuance). We also note in passing that, although defendants do not bear the primary responsibility for alerting the court to speedy trial deadlines, this does not mean that they may deliberately obtain an (h)(8) continuance for their own convenience in the face of speedy trial concerns articulated by the trial court and the later claim that the court abused its discretion in granting the requested continuance. See Jodoin, 672 F.2d at 238; cf. United States vs. Bufalino, 683 F.2d 639, 646 (2nd Cir.

1982), cert. denied, 51 U.S.L.W. 3508 (U.S. Jan. 10, 1983) (defendant may not claim Speedy Trial Act violation caused by own failure to respond to government motion).

Appellants' third object to the June 4 continuance is not frivolous. They argue that the district court should have set a specific ending date for the continuance. See United States vs. Pollock, 726 F.2d 1456, 1461 (9th Cir. 1984) ((h)(8) continuance "proper only if ordered for a specific period of time"). Doubtless it is generally preferable to limit a continuance to a definite period for the sake of clarity and certainty; but at the same time it is inevitable that in some cases, like the present one, a court is forced to order an (h)(8) continuance without knowing exactly how long the reasons supporting the continuance will remain valid.<sup>23</sup> In this case, an alternative trial date of July 6,

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23. This appears to be the concern underlying §6(d)(3) of the Speedy Trial Plan adopted by the District

1981, was rejected by defense counsel on June 4, 1984, because it was anticipated that additional preparation time would be necessary after the conclusion of the Florida trial, at whatever time that might occur. The purpose of (h)(8) continuances is to make the Speedy Trial Act "flexible enough to accommodate the practicalities of our adversary system." Mitchell, 723 F.2d at 1044. We do not think a rule barring open-ended continuances altogether serves this purpose. Moreover, Pollock appears to be the first and, so far, only case to adopt such a rule; it was decided nearly three years after the continuance was granted in this case, and we decline to apply it here. It may well be that some sort of reasonableness limitation is appropriate to prevent continuances from delaying trials unfairly

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23. (continued)

of Maine, which provides:

The Court may grant a continuance under 18 U.S.C. §3161(h)(8) for either a specific period of time or a period to be determined by reference to an event (such as recovery from illness) not within the control of the government . . .

and circumventing the dismissal sanctions in the Speedy Trial Act; but we need not decide at what point, if any, such a limitation might have been exceeded in this case, for even if the June 4 continuance is construed to last only thirty days from the end of the Florida trial, i.e., through July 19, 1981 (two weeks from the alternative July 6 trial date rejected by defendants), there is no Speedy Trial Act violation.

On July 14, 1981, Booth and Middleton filed motions to dismiss on double jeopardy grounds, claiming that their convictions in the Florida proceedings barred further prosecution in this case. A hearing was scheduled for August 11, 1981, but on that date both defendants filed amendments to their motions; accordingly, the hearing was postponed until September 11. Three days later, on September 14, 1981, the district court ruled on both motions, deny-

ing Booth's (in which the eight other defendants convicted in Florida trial had joined) and granting Middleton's. Appeals were taken by the nine defendants whose motion was denied and by the government respectively on September 17 and 22, 1981. The time from the filing of the motions on July 14, through the September 11 hearing and September 14 rulings was excludable with respect to all twenty-one defendants (aside from the three severed female defendants) under (h)(1)(F) & (J) and (h)(7). An independent exclusion then took effect under (h)(1)(E), which automatically excludes "delay resulting from an interlocutory appeal." on the date the defendants filed their appeal. United States vs. McGrath, 622 F.2d 36, 40 (2d Cir. 1980). We announced our decisions affirming both orders in companion cases on March 19, 1982. United States vs. Booth, 673 F.2d 27 (1st Cir.), cert. denied, 456 U.S. 978 (1982);

United States vs. Middleton, 673 F.2d 31 (1st Cir.), reh'g denied (1st Cir., August 10, 1982).

Courts which have considered the question of when an appeal ends and the clock begins to run again for speedy trial purposes have generally held that the applicable date is the date on which the appellate court issues its mandate. United States vs. Mack, 669 F.2d 28, 33 (1st Cir. 1982); United States vs. Ross, 654 F.2d 612, 616 (9th Cir. 1981), cert. denied, 455 U.S. 926 (1982); United States vs. Cook, 592 F.2d 877, 880 (5th Cir.), cert. denied, 442 U.S. 921 (1979); cf United States vs. Gilliss, 645 F.2d 1269, 1276 (8th Cr. 1981) (noting Guidelines use of date district court receives appellate court's mandate). Although these cases relate to subsection (e) (time limits for retrial following appeal) rather than to (h)(1)(E), we see no reason to apply a different ending date to interlocutory appeals under the latter section. In both situations

it is the date on which the mandate is issued which determines when the district court reacquires jurisdiction for further proceedings. See Ross, 654 F.2d at 616. Moreover, where various charges being tried together are appealed separately and the records with respect to both appeals are retained at the defendant's request as a single unit to facilitate review, the speedy trial clock does not begin to run again in the district court until final disposition of both charges. See United States vs. Lyon, 588 F.2d 581, 582 (8th Cir. 1978), cert. denied, 441 U.S. 910 (1979).

In this case, the records in Booth and Middleton were kept together in this court until the latter appeal was finally decided. Although this was not at the defendants' express request, it was, at least with their implied consent. No inquiries, let alone requests, as to the record in Booth were made between the time our mandate issued in that case on April 9,

1981, and the issuance of our mandate in Middleton on August 17, 1982. We need not address any speedy trial claims which might be raised if Middleton had not been pending before this court during that interval, however, because Middleton by itself was sufficient to stop the speedy trial clock with respect to all defendants through August 17 under (h)(1)(E) and (h)(7). Until that date, Middleton did not cease to be "a codefendant as to whom the time for trial ha(d) not yet run and no motion for severance ha(d) been granted."

From August through September 20, 1982 we assume, without deciding, that no speedy trial exclusion was in effect and that these thirty-four days ran on the seventy-day clock. On September 21, 1982, a pretrial conference was held "at which an effort was made by the (district court) to set down trials of the two different groups of defendants which kept moving around back and forth and back and forth . . . At

that time it was agreed by all counsel . . . that the speedy trial clock would stop and (Speedy trial claims) would not be asserted." Appellants concede that this statement by the district court reflects an accurate account of the September 21 waiver, and they do not dispute that the time from September 21, 1982, until the impanelling of the jury on December 7, 1982, was excludable.<sup>24</sup> See Guidelines at 9. We find that a total of, at most, forty-seven nonexcludable days elapsed between the indictment and trial: eleven days from April 17 through April 27, 1981; possibly two days between the September 14, 1981 order and the interlocutory appeal on September 17; and possibly thirty-four days between the issuance of the mandate in Middleton on August 17, 1982, and the speedy trial waiver in open court on September 21. Thus, we conclude that the seventy-day limit was not exceeded.

A separate Speedy Trial Act violation is asserted by Converse, Imoberstag, H. Shnurman and J. Shnurman, who argue-- paradoxically, it might be though--that trial took place too soon after the arraignment, depriving them of adequate preparation time. They cite section 3161(c)(2) of the Act, which provides:

Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

The record shows that all four appellants were arraigned on the superseding indictment on December 6, 1982, the day before trial.

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24. Leaton apparently withdrew his waiver of speedy trial claims as of October 25, 1982. By that time, however, the government's October 12 motion concerning the first amendment defense was pending. The government's motion, along with H. Shnurman's November 2 speedy trial motion, was finally decided on November 23, 1982. An appeal from the latter ruling was filed on November 30. In no event can Leaton allege sufficient nonexcludable time between October 25 and trial to show a Speedy Trial Act violation.

The record also shows, however, that at the time the superseding indictment was returned the original indictment, identical in all respects except for the addition of D. Nissenbaum as a defendant, was still outstanding, and that all four appellants had been arraigned on the original indictment on October 29 and November 7, 1980. The issue before us, therefore, is whether (c) (2) applies to the superseding indictment at all. We think not.

The Speedy Trial Plan adopted by the District of Maine provides that the thirty-day minimum time limit begins to run at the same time as the seventy-day maximum limit when a superseding indictment is returned before the original indictment is dismissed.<sup>25</sup>

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25. Under section 4(d) of the Speedy Trial Plan, a superseding indictment such as the one in this case does not trigger a new seventy-day time limit:

This rule, which avoid conflicting time requirements under (c)(1) and (c)(2), has been adopted by the Seventh Circuit, at least for the situation where the charges in the original and superseding indictments are identical and there is not time gap between the two indictments. United States vs. Horton, 676 F.2d 1165, 1170 (7th Cir. 1982), cert. denied 51 U.S.L.W. 3611 (U.S. Feb. 22, 1983); accord, Guidelines at 14. The Ninth Circuit, on the other hand, has held that the Speedy Trial Act requires that the thirty-day time limit begin to run again when a defendant is reindicted, regardless whether the original indictment has

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25. (continued)

Superseding Charges. If, after an indictment or information has been filed, a complaint, indictment, or information is filed which charges the defendant with the same offense . . . , the time limit applicable to the subsequent charge will be determined as follows:

.. . .  
(2) If the original indictment or information is pending at the time the subsequent charge is filed, the trial shall commence within the time limit for commencement of trial on the original indictment or information.

been dismissed by the time the superseding indictment is returned, at least where the superseding indictment necessitates a change in defense strategy. United States vs. Harris, 724 F.2d 1452, 1454-55 (9th Cir. 1984); cf. United States vs. Arkus, 675 F.2d 245, 248 (9th Cir. 1982) (district court Speedy Trial Plan to the contrary notwithstanding, statute requires that the new thirty-day period apply where original indictment dismissed before superseding

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25. (continued)

Section 7 of the Plan provides:

Minimum Period for Defense Preparation.  
Unless the defendant consents in writing to the contrary, the trial shall not commence earlier than 30 days from the date on which the indictment or information is filed, or, if later, from the date on which counsel first enters an appearance or on which the defendant expressly waives counsel and elects to proceed pro se. In circumstances in which the 70-day time limit for commencing trial on a charge in an indictment or information is determined by reference to an earlier indictment or information pursuant to section 4(d), the 30-day minimum shall also be determined by reference to the earlier indictment or information . . .

indictment returned). Both views reflect the underlying congressional purpose of insuring that defendants be afforded reasonable trial preparation time. Harris, 724 F.2d at 1455, citing United States vs. Daly, 716 F.2d 1499, 1504-05 (9th Cir. 1983), cert. dismissed, 52 U.S.L.W. 3651 (U.S. March 5, 1984); Horton, 676 F.2d at 1170. The statute does not explicitly provide for a new thirty-day period when the indictments overlap. Section 3161(d)(1) makes both the seventy-day and thirty-day time limits in (c) applicable if a superseding indictment is returned after the original indictment is dismissed on the defendant's motion,<sup>26</sup> and subsection (h)

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26. If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an

(6) provides an exclusion for any time gap between the two indictments.<sup>27</sup> The case before us, however, is not governed by (d)(1) or (h)(6). We think it fully consistent with the congressional purpose of (c)(2) to apply the thirty-day limit in (c)(1), unless in a specific case this would deprive a defendant of adequate opportunity to prepare his defense. On the facts of the present case, we conclude

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26. (continued)

offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.  
18 U.S.C. §3161(d)(1).

27. Section (h)(6) provides the following exclusion:

If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be jointed with that offense, any period of delay from the date the charge was dismissed to the date of the time limitation would commence to run as to the subsequent charge had there been no previous charge.

without hesitation that all four appellants had ample time for preparation. Indeed, the district court offered them a one-week continuance on December 6, 1982, which the court though sufficient to cure any possible prejudice flowing from the last-minute arraignments and changes of counsel. The court's proposal was rejected. We note in addition that the appellants appear to be entirely responsible for the delay in their arraignment, which was granted at their request solely in order to save the effort and expense of superfluous pretrial appearances by counsel. Similarly, the potential conflicts which made changes of counsel necessary were apparent long before trial, and the district court acted well within its discretion in denying a longer continuance.<sup>28</sup>

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28. We find no merit in J. Shurman's contention that the denial of a thirty-day continuance, quite aside from the Speedy Trial Act requirements, violated his sixth amendment right to effective assistance of counsel. Not only was this appellant responsible

All defendants, therefore, having been promptly arraigned on the original indictment in 1981, were properly tried in December 1982, and (c) (2) was not violated with respect to any of them.

### III. FREE EXERCISE CLAUSE AND EQUAL PROTECTION.

Appellants claim that they were denied the opportunity to assert a valid, legally sufficient defense based on the free exercise clause of the first amendment.<sup>29</sup> For purposes of this case, the government stipulated to the following facts, which we assume, without deciding, are true:

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28. (continued)

for delaying his arraignment and foreseeable change of counsel until the last minute, but, through counsel, he rejected the seven-day continuance proposed by the district court as a reasonable accommodation. He neither explains why the seven-day continuance would have been insufficient nor suggests how a thirty-day continuance would have met his needs. The record, moreover, reveals a thoroughly competent and active performance by his court-appointed attorney.

29. "Congress shall make no law . . . prohibiting the free exercise (of religion) . . ." U.S. Const. amend, I.

1) that the Ethioipian Zion Coptic Church is a religion embracing beliefs which are protected by the First Amendment; 2) that the use of marijuana is an integral part of the religious practice of the Church; and 3) that (all of the defendants) are members of the Church and sincerely embrace the beliefs of the Church.

On November 23, 1982, the district court ruled as a matter of law that the first amendment did not protect the possession of marijuana with intent to distribute by the defendants, and further ordered that the defendants be precluded from introducing at trial any evidence concerning the Ethiopian Zion Coptic Church and the use of marijuana by its members, insofar as such evidence related to their alleged first amendment defense.<sup>30</sup>

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30. The ruling was carefully tailored to exclude evidence only in relation to the first amendment defense; at trial, two defense witnesses were permitted to testify as to the quantity and methods of marijuana consumption by Church members in support of the Swiderski defense discussed in part IV.

It is well established that the absolute constitutional protection afforded freedom of religious belief does not extend without qualification to religious conduct. Braunfield vs. Brown, 366 U.S. 599, 603 (1961); Cantwell vs. Connecticut, 310 U.S. 296, 303-04 (1940). When a law is challenged as interfering with religious conduct, the constitutional inquiry involves three questions: (a) whether the challenged law interferes with free exercise of a religion; (b) whether the challenged law is essential to accomplish an overriding governmental objective; and (c) whether accommodating the religious practice would unduly interfere with fulfillment of the governmental interest. See United States vs. Lee, 455 U.S. 252, 256-59 (1982).

In light of the government's stipulations, the first limb of the Lee standard is clearly met; there is no question that marijuana use is an integral part of the religious doctrine and practice of the

Ethiopian Zion Coptic Church, and that appellants are sincere practicing members of that Church. The conflict with the criminal sanctions against possession of marijuana with intent to distribute is self-evident.

The question whether the government has an overriding interest in controlling the use and distribution of marijuana by private citizens is a topic of continuing political controversy. Much evidence has been adduced from which it might rationally be inferred that marijuana constitutes a health hazard and a threat to social welfare; on the other hand, proponents of free marijuana use have attempted to demonstrate that it is quite harmless. See Randall vs Wyrick, 441 F.Supp 312, 315-16 (W.D.Mo. 1977); United States vs. Kuch, 288 F.Supp. 439, 446 and 448 (D.D.C. 1968). In enacting substantial criminal penalties for possession with intent to distribute, Congress has weighed the evidence and reached a conclusion which

it is not this court's task to review de novo. Every federal court that has considered the matter, so far as we are aware, has accepted the congressional determination that marijuana in fact poses a real threat to individual health and social welfare, and has upheld the criminal sanctions for possession and distribution of marijuana even where such sanctions infringe on the free exercise of religion. United States vs. Middleton, 690 F.2d 820, 825 (11th Cir.1982), cert. denied 41 U.S.L.W. 3703 (U.S. Mar. 28, 1983); United States vs. Spears, 443 F.2d 895 (5th Cir. 1972); Leary vs. United States, 383 F.2c 851, 859-61 (5th Cir. 1967), rev'd on other grounds 395 U.S. 6 (1969); Randall, 441 F.Supp. at 316 & n.2; Kuch, 288 F.Supp at 448. Only last year, the Eleventh Circuit rejected identical claims raised by some of the very appellants before us in this case, see Middleton, 690 F.2d 820,

and the United States Supreme Court denied review. We decline to second-guess the unanimous precedent establishing an overriding governmental interest in regulating marijuana.

Finally, it has been recognized since Leary that accommodation or religious freedom is practically impossible with respect to the marijuana laws:

Congress has demonstrated beyond doubt that it believes marihuana is an evil in American society and serious threat to its people. It would be difficult to imagine the harm which would result if the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes. For all practical purposes the anti-marihuana laws would be meaningless, and enforcement impossible.

Leary, 383 F.2d at 861; quoted in Middleton 690 F.2d at 825; see also Kuch, 288 F. Supp at 447. Although a narrow administrative exception has been carved out from the Schedule I classification of peyote for the benefit of the Native American Church, see 21 C.F.R. §1307.31,

we think this exemption is properly viewed as a government "effort toward accommodation" for a "readily identifiable," "narrow category" which has minimal impact on the enforcement of the laws in question. Lee, 455 U.S. at 260 n.11 & 261. No broad religious exemption from the marijuana laws is constitutionally required. We therefore affirm the district court's ruling rejecting appellants' first amendment defense as a matter of law.

We reject as well appellants' claim that members of the Ethiopian Zion Coptic Church are entitled as a matter of equal protection to a religious exemption from the marijuana laws on the same terms as the peyote exemption granted the Native American Church. Marijuana is not covered by the peyote exemption; this in itself distinguishes this case from Kennedy vs. Bureau of Narcotics and Dangerous Drugs, 459 F.2d 415 (9th Cir. 1972), cert denied, 409 U.S. 1115 (1973). Moreover, the

peyote exemption is uniquely supported by the legislative history and congressional findings underlying the American Indian Religious Freedom Act, which declares a federal policy of "protect(ing) and preserv(ing) for American Indians the(ir) traditional religions . . . , including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." 42 U.S.C. §1996. The legislative history of the Act "is clear in finding that religion is an integral part of Indian culture and that the use of such items as peyote are necessary to the survival of Indian religion and culture." Peyote Way Church of God, Inc. vs. Smith, 556 F.Supp. 632, 637 (N.D. Tex. 1983). In light of the sui generis legal status of American Indians, see Cherokee Nation vs. Georgia, 30 U.S. 1, 16-17 (1831) (Marshall C.J.), and the express policy of the Ameri-

can Indian Religious Freedom Act (which passed after Kennedy was decided), we think the Ethiopian Zion Coptic Church cannot be deemed similarly situated to the Native American Church for equal protection purposes.

#### IV. SEVERANCE

At trial, the sixteen defendants aligned themselves in two groups asserting different defense theories. One group, known as the "conventional" defendants,<sup>31</sup> decided to put the government to its proof, alleging that there was insufficient evidence to convict them of conspiracy or possession with intent to distribute. The other group, known as the "Swiderski" defendants,<sup>32</sup> contended that they could be convicted of no crime more serious

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31. The conventional group comprised D. Rush, G. Lancelotti, Leaton, Risolvato, Converse, Johnson, Hanson and D. Nissenbaum.

32. The Swiderski group comprised L. Lancelotti, H. Shnurman, Cohen, Imoberstag, Olsen, J. Shnurman, Collins and Brown.

than simple possession because, they alleged, they had acquired joint and simultaneous possession of the marijuana and intended to share it only among themselves rather than distribute it to third persons. See United States vs. Swiderski, 548 F.2d 445, 450-51(2d Cir. 1977). Numerous motions were made for separate trials of the two groups under the applicable federal rule<sup>33</sup>; the district court, however, found that the positions of the two groups were "not so irreconcilable or so antagonistic as to require a severance" and that severance was not "justified."

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33. Fed. R. Crim. P. 14 provides, in relevant part:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

A motion for severance is addressed to the discretion of the trial court, and to prevail defendant must make a strong showing of prejudice . . . We review a trial court's denial of a severance motion for abuse of discretion and reverse only if denial deprived defendant of a fair trial, resulting in a miscarriage of justice.

United States vs. Arruda, 715 F.2d 671, 679 (1st Cir. 1983) (citations omitted).

At the outset, we express considerable skepticism concerning the applicability of a Swiderski defense to the facts of this case. Although the Swiderski court held that "(w)here two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is personal drug abuse--simple joint possession, without any intent to distribute the drug further," 548 F.2d at 450, the court also made it unmistakably clear that its holding was "limited to the passing of a drug between joint possessors who simultaneously acquired possession at the outset for their own use."

Id. at 450-451. The Swiderski holding appears fully justified on the facts of that case, but we hesitate to approve its casual extension to situations where more than a couple of defendants and a small quantity of drugs are involved, for, as the Swiderski court point out:

joint possession of a drug does not preclude a finding of possession with intent to distribute to a third person in violation of §841(a). Whether such an inference may be drawn depends upon the surrounding circumstances, including the nature of the relationship (whether it is commercial rather than personal), the quantity of the drug (whether it is too large for personal use only), the number of people involved, and statements or conduct on the part of the defendants.

Id. at 450; see United States vs. Taylor, 683 F.2d 1, 21 (1st Cir.), cert. denied, 459 U.S. 945 (1982) (Swiderski inapplicable to complex operation, large quantity of marijuana) United States vs. Wright, 593 F.2d 105, 108 (9th Cir. 1979) (Swiderski not applicable where drug not simultaneously and jointly acquired). In the unusual circumstances of the present case, the district

court left to the jury the factual question whether appellants' religious practices could account for their possession of almost one ton of marijuana per defendant and thus negate an inference of intent to distribute to third persons. This may have been an overabundance of caution on the court's part, but it does not affect our analysis of the severance issue. The Swiderski defendants were entitled to pursue whatever factual defense they could support, however implausible it might seem to a finder of fact; in this case, they may have had no colorable alternative.

In denying the severance motions, the district court relied on our decision in United States vs. Talavera, 668 F.2d 625 (1st Cir.), cert. denied sub nom. Pena vs. United States, 456 U.S. 978 (1982). In Talavera, we stated:

Severance is required only where the conflict is so prejudicial and the defenses are so irreconcilable that

the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.

Id. at 630. Applying this standard, the district court reasons:

The jury in this case could find both groups of defendants guilty or not guilty without making any logical error. Just, for example, it is clear in the view of this Court that the finding by the jury that the (Swiderski defendants) possessed marijuana without intending to distribute it beyond themselves or other individuals also on or in the vicinity of the Leurs property, in no way would compel a finding that any other defendant was on the Leurs property or near the Leurs property at that time or that any other defendant also possessed marijuana either actively or constructively, or that any other defendant intended to distribute it in any way.

We find this reasoning persuasive, and conclude that Talavera is controlling in this case. As in Talavera, one defense to the charge of possession with intent to distribute contests both elements of possession and intent, while the other contests only the element of intent. The defenses would become irreconcilable only if the conventional defendants were allowed

to allege as part of their defense that Swiderski defendants intended to distribute the marijuana. Talavera 668 F.2d at 630. This was not done.

A related contention concerning the denial of severance is that the testimony presented by the Swiderski defendants concerning the quantity and methods of marijuana consumption by Ethiopian Zion Coptic Church members had a prejudicial "spillover effect" on the conventional defendants.<sup>34</sup> See Arruda, 715 F.2d at 679. We note, however, that the district court repeatedly instructed the jury during the trial and in

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34. Although Thomas Reilly, a witness called by the Swiderski group to testify as to marijuana consumption within the Ethiopian Zion Coptic Church, stated that he "recognized" all of the defendants as fellow adherents of the Church, his testimony concerning specific individuals concerned only members of the Swiderski group. Reilly did not--indeed, he could not--testify as to the presence of any conventional defendant on the Leurs property on October 20, 1980, or any defendant's possession of marijuana or intent to distribute it to third persons at that time.

the final charge to "consider the evidence as to each count separately and separately with respect to each defendant." The court also specifically cautioned the jury that mere association with a group of defendants who might be members of the same church was not sufficient evidence to establish the existence of a conspiracy. These instructions were properly given to cure any potential spillover effect. The jury must have heeded the instructions, for its verdicts were clearly not reached on an arbitrary or undifferentiated basis. Of the eight conventional defendants, five were acquitted on count one and convicted on count two, one was convicted on both counts, one was convicted on the first count only, and one was acquitted on both counts and four on the second count only. We find that appellants failed to meet their heavy burden of showing that the denial of severance motions made their trial unfair.

## V. CONCLUSION

Appellants' other sundry contentions lack merit.<sup>35</sup> There was sufficient evidence to convict each of the appellants found on or about the Leurs property on October 20, 1980. The convictions cannot have been based on mere presence, but reflect the surrounding circumstances as well: there was a common association, false names were given to arresting officers, flight was attempted, large amounts of marijuana were found nearby in plain view, and convincing alternative explanations were lacking. This is a far cry from the situation in United States vs. Francomano, 554 F.2d 482 (1st Cir. 1977), where the defendants had no prior association, the amounts of marijuana were small and readily concealed, and their presence aboard ship was apparently

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35. Appellants' motions for a judgment of acquittal or a new trial were denied from the bench by the district court on February 18, 1983. Appellant J Shnuman is correct in attributing the court clerk's handwritten notation "granted" on two of those motions to clerical error.

unrelated to the contraband cargo.

Finally, it is clear that the district court adequately investigated the possibility of jury taint. The single juror who indicated the slightest ground for concern was promptly excused, and the remaining jurors were regularly questioned as to whether they had been exposed to media reports inadvertently or otherwise. Although one defense attorney apparently contravened a court order in attempting to ferret out rumors of additional jury taint, the rumors he brought to the court's attention were never substantiated by affidavit or presented in a post-trial motion as the court suggested. We see no basis for challenging the convictions on this ground.

We conclude, therefore, that appellants have failed to prove reversible error or prejudicial unfairness in the conduct of the trial.

The convictions are affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

No. 83-1177  
No. 83-1391  
No. 83-1463

UNITED STATES OF AMERICA,  
Appellee,

vs.

DONALD NIXON RUSH, et al,  
Defendants/  
Appellants.

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JUDGMENT

Entered: June 27, 1984

These causes came on to be heard on appeals from the United States District Court for the District of Maine, and was argued by counsel.

Upon the consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court (as to Donald Nixon Rush) is affirmed.

By the Court:

Clerk.

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

No. 83-1177  
No. 83-1391  
No. 83-1463

UNITED STATES OF AMERICA,  
Appellee,

vs.

DONALD NIXON RUSH, et al.,  
Defendants/  
Appellants.

Before COFFIN and BOWNES, Circuit Judges,  
and PETTINE,\* Senior District Judge.

ORDER OF COURT  
ON PETITION FOR REHEARING FILED BY ATTORNEY COOK  
Entered July 26, 1984

The Petition for rehearing filed by James Cook on behalf of appellants is denied. Appellants seek to equate the panel decision affirming dismissal in United States vs. Middleton, 673 F.2d 31 (1st Cir. 1982), with a severance of Middleton from the other defendants without regard to the pendency of a timely motion for rehearing. As we held at pages 23-24 of our slip opinion in the

present case, the dismissal as to Middleton became operative as ~~the~~ equivalent of a severance for purposes of the Speedy Trial Act only when we issued our mandate on Aug. 17 after considering and denying the government's petition for rehearing. Although, as appellants recognize, the district court could have entered an "ends of justice" continuance under (h)(8) as to the other defendants while the motion for rehearing in Middleton remained pending, we think this would have been superfluous, for the exclusion under (h)(1)(E) was automatic. Furthermore, unlike (h)(1)(J), (h)(1)(E) does not provide for an exclusion automatically limited to 30 days; the holding in United States vs. Black, 733 F.2d 349 (4th Cir. 1984), concerning an (h)(1)(J) exclusion for an untimely petition for rehearing in banc filed after the issuance of the appellate court's mandate, is not inpoint. We have already considered and rejected J. Shnurman's contention that the

denial of a thirty-day continuance following his arraignment on the superseding Speedy Trial Act or the Sixth Amendment. Slip op. 25-29 & n.28.

By the Court,

Clerk

\*Of the District of Rhode Island, sitting by designation.

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ORDER OF COURT  
ON PETITION FOR REHEARING FILED BY JACOB SHNURMAN

Entered July 26, 1984

The petition for rehearing is denied. Petitioner Jacob Shnurman claims that he was denied the opportunity to present a "factual defense" to the jury based on the theory that "the seized marijuana was jointly possessed by the membership of the Zion Coptic Church." The district court properly ruled that on the facts of this case there was no basis in law or fact for such a defense because the only people who could have acquired joint and simultaneous

possession, see United States vs. Swiderski, 548 F.2d 445, 450-451 (2d Cir. 1977), were those present when the marijuana was unloaded. For reasons fully set forth in our slip opinion, the first amendment does not supersede the criminal sanctions against possession of marijuana with intent to distribute. Petitioner's argument lacks merit.

Petitioner also disagrees with our reasoning distinguishing his situation from that of members of the Native American Church who enjoy an administrative exemption for their religious use of peyote. Our reasoning is fully set out in our slip opinion, and we see no reason to supplement it or reconsider it.

By the Court,

Clerk.

ORDER OF COURT  
ON PETITION FOR REHEARING FILED BY THOMAS  
G. CONVERSE

Entered: July 26, 1984

The petition for rehearing filed by

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James Poliquin on behalf of Apepllant  
Thomas G. Converse is denied. Neither  
the conventional defendants nor the  
Swiderski defendants alleged as part of  
their defense that the other group (or any  
individual defendant) intended to distri-  
bute the marijuana. Under our controlling  
holding in United States vs. Salavera, 668  
F.2d 625 (1st Cir), cert. denied sub nom.  
Pena vs. United States, 456 U.S. 978 (1982),  
which we have already declined to reconsi-  
der, the district court had discretion to  
deny the motions for severance.

By the Court,

Clerk.

ORDER OF COURT  
ON PETITION FOR REHEARING FILED BY CARL ERIC  
OLSEN

Entered: July 26, 1984

Upon consideration of the petition for  
rehearing filed by Carl Eric Olsen.

It is ordered that said petition be  
and the same is hereby denied.

By the Court.

Clerk

## APPENDIX C

### §841. Prohibited acts A

#### Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance; or

(2) to creat, distribute, or dispense or possess with intent to distribute or dispense, a counterfeit substance.

### §846 Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

## 18 U.S.C. §3161 TIME LIMITS & EXCLUSIONS

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of a crime shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended by an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date ( and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defend-

ant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not

to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) (18 U.S.C.S. §3161(h)) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 (18 U.S.C.S. §3162) apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the

case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) (18 U.S.C.S. 3161(h)) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 (18 U.S.C.S. 3162) apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter (18 U.S.C.S. 3163(a)) the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, and for the second such twelve-calendar-month period such time limit shall be forty-five

days and for the third such period such limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter (18 USCS 3163(b)), the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to-

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of Title 28, United States Code (28 USCS §2902);

(C) delay resulting from deferral of prosecution pursuant to section 2902 of Title 28, United States Code (28 USCS §2902);

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or any other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure (USCS Rules of Criminal Procedure);

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date of an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3) (A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A)

of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be ascertained by due diligence. For purposes of such subparagraph, a defendant or essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of Title 28, United States Code (28 USCS §2902).

(6) If the information or indictment is dismissed upon motion of the attorney for

the Government and thereafter the charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interests of the public and the defendant in a speedy trial. No such period

of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interest of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (a) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or

for the trial iteself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b) (this section) or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable tim necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under paragraph 8(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(i) If the trial did not commence within the time limitation specified in section 3616 (this section) because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161 (this section) on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly-

(A) undertake to obtain the presence of the prisoner for trial; or

(b) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of the prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(Added January 3, 1975, P. L. 93-619, Title I, §101, 88 Stat. 2076)

## APPENDIX D

### §1254. Courts of appeals; certiorari, appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

## APPENDIX E

### TEXT OF AMENDMENTS TO THE CONSTITUTION

#### AMENDMENT (I)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the free of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

#### AMENDMENT (14)

All persons born or naturalized in the United States, and subject to the juris-

diction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



(2)  
No. 84-685

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FILED

FEB 5 1985

ALEXANDER L. STEVAS,  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1984

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DONALD NIXON RUSH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

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## QUESTIONS PRESENTED

1. Whether the defense preparation period provision of the Speedy Trial Act, 18 U.S.C. 3161(c)(2), required that petitioners Harry and Jacob Shnurman be afforded a new 30-day defense preparation period following a substitution of counsel.

2. Whether the pendency of the government's petition for rehearing seeking reconsideration of the court of appeals' affirmance of the dismissal of charges against one of petitioners' co-defendants tolled the time limits for trial for petitioners under the Speedy Trial Act.

3. Whether petitioners should have been permitted to raise a "religious exemption" defense to the charge of possession with intent to distribute 21 tons of marijuana.

4. Whether the district court abused its discretion in failing to sever petitioners into two groups for separate trials.



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**In the Supreme Court of the United States**

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

**OPINION BELOW**

The opinion of the court of appeals (Pet. App. 1-63) is reported at 738 F.2d 497.

**JURISDICTION**

The judgment of the court of appeals was entered on June 27, 1984, and petitions for rehearing were denied on July 26, 1984 (see Pet. App. 65-69). The petition for a writ of certiorari was filed on October 23, 1984, and is therefore out of time under Rule 20.1 of the Rules of this Court.

## STATEMENT

Following a jury trial in the United States District Court for the District of Maine, 14 of the 15 petitioners were convicted of possessing with intent to distribute 21 tons of marijuana (Count II), in violation of 21 U.S.C. 841(a)(1) and (b)(6), and six of the petitioners were convicted of conspiracy to commit the substantive offense (Count I), in violation of 21 U.S.C. 846.<sup>1</sup> They were sentenced as follows: Rush and Harry Shnurman to five years' imprisonment to be followed by three years' special parole; Leaton, Risolvato, Cohen, Converse, Olsen, Johnson and Gregory Lancelotti to five years' imprisonment to be followed by two years' special parole; Nissenbaum to five years' imprisonment; Larry Lancelotti to six and a half years' imprisonment; Brown to six years and nine months' imprisonment to be followed by four years' special parole; Imoberstag and Collins to eight years and eight months' imprisonment, to be followed by four years' special parole; Jacob Shnurman to nine and a half years' imprisonment to be followed by four years' special parole.

1. The evidence at trial showed that in the spring of 1980 petitioner Nissenbaum bought two 20-acre parcels of land in Maine, using assumed names in the transactions. One parcel had shore frontage, a deep water dock, and access to the Atlantic Ocean. The inland tract had substantial warehouse facilities (Tr. 4, 20-22, 44-47, 217-218). Suspecting that the parcels

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<sup>1</sup> Petitioner Nissenbaum was not convicted of the substantive charge; he was convicted only on the conspiracy count. Petitioners Rush, Cohen, Collins, Brown, and Larry Lancelotti were convicted on both counts and received concurrent sentences.

had been purchased for use in drug smuggling, law enforcement agents began surveillance of the property. On the afternoon of October 19, 1980, twenty people gathered on the dock and appeared to be keeping watch on vessels approaching from the ocean. They had with them three inflatable Zodiac rubber boats.

At approximately midnight on October 19, 1980, the *Jubilee*, a 70-80 foot diesel engine shrimper, came into the bay without navigational lights, hugging the shore until it reached the dock (Tr. 206, 228, 229, 364). The three Zodiac boats were launched and tied up to the *Jubilee* (Tr. 230). People aboard the *Jubilee* began passing a series of bales to the Zodiacs, which ferried the bales to shore (Tr. 230, 364). At the dock, a human chain unloaded the bales onto the lawn and into nearby pickup trucks operating without lights (Tr. 231, 364).

Law enforcement agents maintaining surveillance watched this process being repeated for almost three hours (Tr. 231). At 3:00 a.m., a caravan of marked and unmarked police cars made its way to the property (Tr. 232, 275). When the officers announced that they were police, the people on the dock scattered in all directions, pursued by the agents (Tr. 234, 236, 365). Petitioners were arrested in various locations in the area during the next few hours. Some of the petitioners were arrested on board the *Jubilee*. During the ensuing investigation, the agents seized 1263 bales of marijuana, weighing a total of 21 tons (Tr. 400, 420).

## ARGUMENT

1. Petitioners raise two speedy trial claims. First petitioners Harry and Jacob Shnurman contend that, under the Speedy Trial Act, they were entitled to a new 30-day defense-preparation period following their arraignment on the superseding indictment. Because they were tried on the day following that arraignment and had recently substituted new counsel, they argue that they were tried *too soon* under Section 3161(c)(2) of the Speedy Trial Act. In addition, all of the petitioners claim that their trial was impermissibly tardy under other provisions of the Speedy Trial Act. In the latter connection, petitioners argue that the courts below improperly excluded from their speedy trial calculations a period during which a government petition for rehearing was pending in the court of appeals. Neither of these Speedy Trial Act claims has merit, and the court of appeals correctly found that both the maximum and the minimum time limits of the Act were complied with here.

a. Petitioners Harry and Jacob Shnurman were originally indicted (along with all but one of the other petitioners) on October 24, 1980; they were arraigned on that indictment shortly thereafter. A superseding indictment was returned in February 4, 1981. It did not alter the charges against the Shnurmans; instead, it merely added petitioner Nissenbaum as a co-defendant. The Shnurmans requested that their arraignment on the superseding indictment be postponed until trial to minimize the travel expenses to be incurred by their Iowa-based counsel. Pursuant to their request, they were arraigned on December 6, 1982, the day before trial was scheduled to begin.

At the December 6 hearing, a new attorney was appointed to represent Jacob Shnurman. A new at-

torney had been retained to represent Harry Shnurman on December 3, 1982. Previously each of the Shnurmans had shared counsel with one or more of their co-defendants. On December 6, the Shurmans claimed a right to a 30-day continuance under Section 3161(c)(2) of the Speedy Trial Act, arguing that they were automatically entitled to a new 30-day preparation period following their arraignment on the superseding indictment. The district court did not agree that such a continuance was mandatory here, but it nevertheless offered the Shnurmans a one-week continuance to enable them to prepare for trial with their new attorneys. In the court's view, further delay was unnecessary because the case against the Shnurmans was simple and straightforward: Harry Shnurman was arrested on the shore near the dock where the bales of marijuana were being unloaded; Jacob Shnurman was rescued from the frigid waters while swimming away from the dock in an effort to avoid capture. The Shnurmans declined the court's offer of a one-week continuance.

The court of appeals rejected the Shnurmans' claim that they were automatically entitled to a 30-day continuance following their arraignment on the superseding indictment (Pet. App. 39-46). The court observed that the "statute does not explicitly provide for a new thirty-day period when the indictments overlap" (*id.* at 43). The court concluded that the return of a superseding indictment while the original indictment is outstanding does not trigger a new defense-preparation period "unless in a specific case this would deprive a defendant of adequate opportunity to prepare his defense" (*id.* at 44). Based on its review of the record, including the performance of counsel, the court found "without hesitation" that the

Shnurman's had "ample time for preparation" (*id.* at 45 & n.28). In this regard, the court noted that petitioners had refused the one-week continuance offered by the court and that they were responsible for both the delay in their arraignment and the last minute timing of the substitution of counsel. With respect to the latter point, the court observed that "the potential conflicts which made changes of counsel necessary were apparent long before trial" (*ibid.*).

Petitioners now concede (Pet. 15) that as a general rule a superseding indictment does not trigger a new defense-preparation period under Section 3161(c)(2).<sup>2</sup> They contend, however—apparently for the first time in any court (compare Pet. 15 with Pet. App. 39-46)—that they were entitled to a new statutory preparation period because they changed counsel on the eve of trial. In their view, Section 3161(c)(2) requires

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<sup>2</sup> Accordingly, they concede the correctness of the court of appeals' interpretation of Section 3161(c)(2), which is consistent with the position that the government has advanced in its petition in *United States v. Rojas-Contreras*, No. 84-1023, filed December 26, 1984. In *Rojas-Contreras*, the question presented is whether a defendant is automatically entitled to a new preparation period following the return of a superseding indictment that makes an immaterial alteration in the charge against that defendant. Because the Shnurmans agree that the correct answer to this question is negative, there is no reason to hold this case for disposition in light of *Rojas-Contreras*. Such action would in any event be inappropriate for two additional reasons that distinguish the cases. First, under any view of the Act, the Shnurmans waived any right to a new preparation period by deliberately postponing their arraignment until trial to save on attorney's fees. Second, the new indictment here did not in any respect alter the wording of the charges against them, but merely added an additional defendant (who did receive a 30-day trial preparation period).

a new preparation period following each change of counsel.

Even if this contention had been preserved for review, it would be unavailing. The statutory language provides no support for the Shnurmans' claims. Section 3161(c)(2) provides (emphasis added):

Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant *first* appears through counsel or expressly waives counsel and elects to proceed pro se.

The language is unambiguous; a defendant "*first* appears through counsel" only once, whether or not he changes counsel at a later date. See *United States v. Darby*, 744 F.2d 1508, 1520 (11th Cir. 1984) (emphasis in original) ("When employing the term 'first' Congress presumably did not have *subsequent* appearances in mind.). And the rule proposed by petitioners would invite abuse by defendants, making possible indefinite postponement of trial, thereby defeating the overriding purpose of the Act.

Contrary to petitioners' contention (Pet. 14-16), *United States v. Campbell*, 706 F.2d 1138 (11th Cir. 1983), *United States v. Harris*, 724 F.2d 1452 (9th Cir. 1984), and *United States v. Daly*, 716 F.2d 1499 (9th Cir. 1983), do not support their position. *Campbell* does not speak to the issue at all. The question there was whether the maximum time limit of the Act, rather than the minimum time limit, had been exceeded. Neither does *Harris* address the question. In *Harris* there was no substitution of counsel. Instead, the Ninth Circuit held that Harris was entitled to a new defense-preparation period because a superseding indictment had been returned. Because the

Shnurmans predicate their entitlement to a new 30-day period on the last minute change of counsel rather than on the return of the superseding indictment, *Harris* would not help them, even assuming it is correctly decided.<sup>3</sup>

*Daly*, by contrast, is pertinent here; it is clearly inconsistent with petitioners' contention, however. In *Daly* an attorney was appointed to represent defendant Klemp solely for the purpose of a bail hearing. A different attorney was appointed to represent Klemp at trial. The court of appeals held that the 30-day period ran from Klemp's first court appearance with trial counsel. 716 F.2d at 1504-1505. But in so ruling, the court made clear the narrowness of its holding (*id.* at 1505):

We therefore hold that the 30-day period begins to run when an attorney appears on a defendant's behalf after the indictment or information has been filed, unless there is an indication that the attorney is appearing only for a limited purpose and will not further represent that defendant at trial. If the attorney has been appointed to represent the defendant only for a specific pre-arraignment purpose or at the time of his initial appearance or prior to the filing of the indictment or information disavows his intent to represent the defendant further, the period will not commence because the statutory purpose for the 30-day delay would not be fulfilled.

Under *Daly*, the Shnurmans were not entitled to a new 30-day period following substitution of counsel.

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<sup>3</sup> The Ninth Circuit's decision in *Rojas-Contreras*, which we have asked this Court to review, (see page 6 note 2, *supra*), rests on its prior decision in *Harris*.

Their original attorneys fully intended to represent them at trial and petitioners intended that they do so; original counsel did not appear solely for some limited purpose. The Shnurmans changed counsel on the eve of trial to avoid potential conflicts of interest that, as the court of appeals concluded (Pet. App. 45), had long been apparent. In the circumstances, there is no basis for the Shnurman petitioners' claim that they were entitled to additional preparation time.

b. All petitioners contend (Pet. 7-13) that trial commenced beyond the 70-day limit set forth in Section 3161(c)(1) of the Speedy Trial Act and, accordingly, that the indictment should have been dismissed. As petitioners acknowledge, the 70-day limit is subject to expansion by certain periods of excludable delay. 18 U.S.C. 3161(h). Petitioners claim, however, that the period during which a government rehearing petition was pending in the court of appeals should not have been excluded in computing the deadline for trial because the rehearing petition applied only to their co-defendant Clifton Middleton. There is no merit to this claim.

Ten of the original defendants in this case moved to dismiss the indictment on double jeopardy grounds. The district court granted the motion of one defendant, Middleton, and denied the motions of the remaining defendants. The government appealed from the order as to Middleton; the nine other defendants took an interlocutory appeal from the adverse rulings they had received. The appeals were argued together and both were decided on March 19, 1982. The district court's rulings as to both Middleton and the other defendants were affirmed. *United States v. Booth*, 673 F.2d 27; *United States v. Middleton*, 673 F.2d 31. The government filed a rehearing petition in

*Middleton* on May 3, 1982. The records in both *Booth* and *Middleton* were retained by the court of appeals until the *Middleton* rehearing petition was denied on August 10, 1982. The mandate in *Middleton* issued seven days later.

Thereafter, petitioners moved the district court to dismiss the indictment on statutory Speedy Trial Act grounds, claiming that the Speedy Trial Act "clock" was running on their cases after their own appeal was decided even though the government's rehearing petition was still pending in *Middleton*, and that the time for trial had expired. In addressing this claim (Pet. App. 33-37), the court of appeals found the entire period from the filing of the notices of appeal in *Booth* and *Middleton* through the issuance of the mandate in *Middleton* to be excludable. In reaching this result, the court of appeals relied on 18 U.S.C. 3161(h)(1), (h)(1)(E) and (h)(7). Subsection (h)(1)(E) excludes from calculation of the deadline for trial "delay resulting from any interlocutory appeal." Subsection (h)(7) makes applicable to all co-defendants any exclusion applicable to one defendant in a multi-defendant case, provided only that "no motion for severance has been granted." The court of appeals reasoned that until it had denied the government's rehearing petition in *Middleton*, *Middleton* did not cease to be a co-defendant in the case (Pet. App. 36-37).

The court of appeals' ruling was manifestly correct. Petitioners and *Middleton* were charged in a single indictment and would have been tried together but for the dismissal as to *Middleton* on double jeopardy grounds. That dismissal did not become final until the government exhausted its appellate remedies. Had the government prevailed on its rehearing petition,

there can be little doubt that Middleton would still have been a co-defendant in the case as to whom no severance had been granted. Accordingly, during the period in question, Middleton was still a defendant in the case and the government's rehearing petition suspended the time limits for all defendants. Cf. *United States v. McGrath*, 613 F.2d 361, 366 (2d Cir. 1979), cert. denied, 446 U.S. 967 (1980). Indeed, any other rule could have forced the district court to proceed with a trial while the rehearing petition was still pending as to Middleton, running the risk that the trial would have to be repeated as to Middleton.<sup>4</sup>

Petitioners also argue (Pet. 12) that, in any event, only 30 days of the period while the government's rehearing petition in *Middleton* was pending are to be excluded from computation of the 70-day deadline for trial and that the overage renders their trial untimely. Petitioners rely on 18 U.S.C. 3161(h)(1)(J) and on *United States v. Black*, 733 F.2d 349 (4th Cir. 1984). Neither supports petitioner's contention.

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<sup>4</sup> While it may have been possible, as petitioners suggest (Pet. 11), for the district court to obviate this dilemma by entering a discretionary "ends-of-justice" continuance under 18 U.S.C. 3161(h)(8), such an order was superfluous, as the court of appeals observed in denying petitioners' rehearing petition (Pet. App. 66), because the Speedy Trial Act provides for automatic exclusion of time in this situation. We note that requiring the district court to grant a continuance in this situation would not in any way serve the purposes of the Speedy Trial Act or protect defendants. Nor does recognizing an automatic exclusion, as the courts below did, strip the district court of discretion to grant a severance and proceed with trial while the rehearing petition as to another defendant is under submission. As the court of appeals observed (Pet. App. 36), petitioners made no effort to urge the district court to proceed in this fashion.

Section 3161(h)(1)(J) mandates exclusion from trial deadline computations of "any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court." But the 30-day time limit established by Section 3161(h)(1)(J) generally does not apply to appellate proceedings.<sup>5</sup> Rather, separate provisions of the Act provide for exclusion of time consumed by appellate proceedings and proceedings in this Court. Thus, 18 U.S.C. 3161(h)(1)(E) provides for exclusion of the time attributable to any interlocutory appeal, without regard to the 30-day limit of Section 3161(h)(1)(J). And Section 3161(d)(2) provides that when an indictment is dismissed by the district court and reinstated following a government appeal "trial shall commence within seventy days from the date the action occasioning the trial becomes final."<sup>6</sup> Similarly Section 3161(e) generally allows

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<sup>5</sup> Petitioners' construction would put an entirely unmanageable burden on appellate courts, including this Court, since it would prohibit them from having an interlocutory appeal under advisement for more than 30 days, except at the cost of starting the speedy trial clock running. The result would be that, even if the government prevailed on an interlocutory appeal, the indictment would in most cases have to be dismissed under the Speedy Trial Act. Plainly Congress did not intend such results.

<sup>6</sup> The court of appeals appears to have assumed that the time during which the government's appeal in *Middleton* was pending was excludable under the *interlocutory* appeal provision, Section 3161(h)(1)(E). See page 10, *supra*. While this was a correct characterization of petitioners' appeals, the government's appeal was from a final order dismissing the indictment as to Middleton on double jeopardy grounds. In any event, Section 3161(d)(2) makes clear that the Speedy Trial Act clock had not run out as to Middleton until

70 days for retrial following appellate reversal of a conviction. In other words, the Speedy Trial Act "clock" is effectively restarted at the beginning in either of these situations. Under any of these provisions the Speedy Trial Act clock is restarted only when all appellate remedies, including review sought in this Court, have been exhausted. See *United States v. Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 4 n.4 (Brennan, J., dissenting); *United States v. Dunn*, 706 F.2d 153, 155 (5th Cir. 1983); cf. *United States v. Lyon*, 588 F.2d 581, 582 (8th Cir. 1978), cert. denied, 441 U.S. 910 (1979).<sup>7</sup> Thus the Speedy Trial Act does not limit the exclusion of time consumed by appellate proceedings to 30 days.

*United States v. Black*, *supra*, is not to the contrary. In *Black*, the defendant's conviction was re-

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the government's appeal was finally disposed of; accordingly, under Section 3161(h) (7), the continued pendency of *Middleton* required exclusion of time as to all petitioners.

<sup>7</sup> As the court of appeals observed (Pet. App. 35), when review is not sought in this Court, the issuance of the court of appeals' mandate usually restarts the Speedy Trial Act clock. Relying on this rule, petitioners urge (Pet. 9, 12) that the issuance of the mandate on their interlocutory appeals restarted the Speedy Trial Act clock. But as we have explained above, because the clock was not yet restarted for defendant Middleton, whose case had yet to be finally severed from those of the petitioners, the separate provisions of Section 3161(h) (7) require the exclusion of additional time. The cases cited by petitioners (Pet. 9, 12) for the proposition that the issuance of the mandate restarted the Speedy Trial Act clock simply do not address the situation created by joinder of multiple defendants whose appeals are not concluded at the same time. Accordingly, they do not conflict with the decision below.

versed on appeal. 692 F.2d 314 (4th Cir. 1982). The government filed a petition for panel rehearing. The petition was denied, and the mandate issued. This latter event presumably started the 70-day retrial clock. See page 13 note 7, *supra*. Following issuance of the mandate, the government filed a motion with the court of appeals seeking leave to file out of time a second petition, this time suggesting rehearing en banc, and asking that the court recall its mandate and grant the petition. The court of appeals denied the government's motion 27 days later.<sup>8</sup> Thereafter, Black moved to dismiss the indictment alleging that his retrial did not commence within 70 days of the issuance of the mandate, and accordingly violated 18 U.S.C. 3161(e). The government argued that no violation had occurred because the period during which its motion was pending in the court of appeals should not be counted toward the 70-day retrial limit. The district court disagreed and dismissed the indictment. The government appealed, and the court of appeals reversed. 733 F.2d 349. Citing Section 3161(h)(1)(J), which allows for the exclusion of up to 30 days for proceedings under advisement, the court held that the 27 days during which the government's motion to file an untimely rehearing petition had been under advisement in the court of appeals should have been excluded.

As these facts show, *Black* is easily distinguished from the instant case. In *Black* the only question was whether the issuance of the court of appeals' mandate rendered the time during which the motion to

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<sup>8</sup> The Fourth Circuit denied the motion to file the rehearing petition, rather than denying the rehearing petition itself. See 733 F.2d at 353 (Winter, C.J., dissenting). Compare page 15 note 9, *infra*.

file the second rehearing petition was pending non-excludable. Answering that question in the negative, the court simply assumed that the exclusion attributable to the pendency of the motion was governed by Section 3161(h)(1)(J). Assuming *arguendo* the correctness of this assumption, it has no bearing here. There is no question here that the *Middleton* appeal remained pending in the court of appeals until the government's timely rehearing petition was denied; the mandate in *Middleton* did not issue until August 17, 1982.<sup>9</sup> Thus this case is controlled by the general rule that the entire course of appellate proceedings is excludable. By contrast, as the court of appeals observed (Pet. App. 66), *Black* deals only with the effect of filing of an untimely rehearing petition after the court of appeals has lost general appellate jurisdiction by issuing the mandate.

2. Petitioners next contend (Pet. 16-20) that the district court improperly precluded them from presenting a First Amendment defense under the Free Exercise Clause—namely, that their possession of 21 tons of marijuana was constitutionally protected because use of marijuana is a rite of the Ethiopian Zion

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<sup>9</sup> Petitioners allege (Pet. 9) that the government's rehearing petition in *Middleton* was untimely. The government had been granted a 30-day extension of rehearing time. That extension on its face expired on Sunday, May 2, 1982, when the clerk's office was closed, and the petition was filed the next day when it reopened. Under Fed. R. App. P. 26(a) the petition was timely filed. In any event, the court accepted the petition for filing and the petition was ultimately denied three months later (rather than being dismissed or returned). As a result, the mandate in *Middleton* did not issue until after the rehearing petition was denied.

Coptic Church, to which they claim to belong.<sup>10</sup> The court below correctly rejected this claim as without merit, recognizing that the proffered defense was insufficient in law (Pet. App. 46-52).

This Court has long recognized that not all burdens on religion are constitutionally impermissible. See *United States v. Lee*, 455 U.S. 252, 257 (1982); *Davis v. Beason*, 133 U.S. 333, 345 (1890) ("Crime is not the less odious because sanctioned by what any particular sect may designate as religion."). The court below correctly applied (Pet. App. 50-52) the balancing test set forth in *Lee* and concluded that "[n]o broad religious exemption from the marijuana laws is constitutionally required" (*id.* at 52).

Indeed, the courts have uniformly held that Congress may constitutionally control the use, even for religious purposes, of drugs that it determines to be dangerous. *United States v. Middleton*, 690 F.2d 820, 825 (11th Cir. 1982), cert. denied, 460 U.S. 1051 (1983); *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), rev'd on other grounds, 395 U.S. 6 (1969). See also *Native American Church v. United States*, 468 F. Supp. 1247, 1249 (S.D.N.Y. 1979), aff'd, 633 F.2d 205 (2d Cir. 1980); *United States v. Hudson*, 431 F.2d 468 (5th Cir. 1970), cert. denied, 400 U.S. 1011 (1971); *Randall v. Wyrick*, 441 F. Supp. 312 (W.D. Mo. 1977); *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968). In *Leary*, the Fifth Circuit carefully considered the legality of drug use as part of religious practice in light of the decisions of this Court. The court there held that the govern-

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<sup>10</sup> Petitioner Charles Leaton is not entitled to raise this issue because he indicated prior to trial that he was not going to rely on the First Amendment defense (see Pet. App. 19, n.20).

ment had both the power and the duty to control the use of marijuana. It also observed that the paramount governmental interest in protecting society overrode any interest—even if religiously motivated—that the defendant might have had in unrestricted drug usage. 383 F.2d at 860. See also *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Reynolds v. United States*, 98 U.S. 145 (1878).<sup>11</sup>

3. Petitioners finally contend (Pet. 20-22) that the district court should have severed the defendants into two groups: those who planned to present no defense and those who claimed, citing *United States v. Swiderski*, 548 F.2d 445, 450-451 (2d Cir. 1977), that they jointly possessed the 21 tons of marijuana for their own (religious) use and had no intent to distribute

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<sup>11</sup> Nor is there merit to petitioners' claim (Pet. 20) that they must be allowed to use marijuana because the Native American Church has special dispensation for sacramental use of peyote. As the court of appeals observed (Pet. App. 52-53), petitioners' equal protection claim fails because marijuana is not covered by the peyote exemption, and because

the peyote exemption is uniquely supported by the legislative history and congressional findings underlying the American Indian Religious Freedom Act, which declares a federal policy of "protect(ing) and preserv(ing) for American Indians the(ir) traditional religions . . . , including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." 42 U.S.C. § 1996.

The court observed that peyote usage by American Indians was contemplated by the legislative history of 42 U.S.C. 1996. Petitioners point to no similar congressional findings that would warrant like treatment for the Ethiopian Zion Coptic Church.

it.<sup>12</sup> The courts below correctly held (see Pet. App. 54-61) that petitioners were not entitled to a severance because the defenses presented were not irreconcilable. The defendants who admitted possession while disavowing any intent to distribute the marijuana did not implicate their silent co-defendants in the offense. On the contrary, the government was still required to connect each of the nontestifying defendants to the marijuana that was being unloaded from the *Jubilee*. And in no sense did the silent defendants incriminate the defendants who testified. The jury could not infer from some defendants' silence that other defendants were lying about their intention to retain the marijuana for personal use.

Moreover, as the court of appeals noted (Pet. App. 61), the district court instructed the jury to "consider the evidence as to each count separately and separately with respect to each defendant." And the verdict demonstrates that the jury was able to treat each defendant individually. The jury acquitted one defendant on both counts and convicted five petitioners on both counts. Of the remaining petitioners, one was convicted only on Count I; the others were convicted only on Count II. Accordingly, petitioners were not prejudiced by their joint trial.

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<sup>12</sup> Like the court of appeals (Pet. App. 56-57), we doubt that the latter was a viable defense given the record of this case. The massive quantity of marijuana involved here—21 tons—itself refutes any claim of possession for personal use.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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